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Supreme Court of the United States.

OCTOBER TERM, 1887.

Nos. 4 and 5.

CITY OF NEW ORLEANS

versus

THE UNITED STATES *ex rel.* MYRA CLARK GAINES.

Writ of Error from the Circuit Court of the United States for the Eastern District of Louisiana.

Brief of Plaintiff in Error.

J. R. BECKWITH,
Counsel for Plaintiff in Error.

A. W. Hyatt, Print, 73 Camp St., N. O.—2359

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BRIEF OF PLAINTIFF IN ERROR.

NOTE—This brief was prepared during the last term of the Court. The case of New Orleans vs. Gaines was then 183 on the docket, and is referred to by that number instead of 15, its present number.

(Record, p. 124.)

Assignment of Errors.

Supreme Court of the United States.

THE CITY OF NEW ORLEANS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA *ex rel.* MYRA CLARK GAINES, Defendant in Error.

And now comes the City of New Orleans, by Charles F. Buck, city attorney, and J. R. Beckwith, special counsel herein, and for assignment of errors herein, say that the judge of the circuit court and said circuit court of the United States for the eastern district of Louisiana, erred herein, and that the judgment herein is erroneous for the following errors, amongst others which said errors are hereinafter assigned, viz:

1st.

That the said petition herein and said showing made by the said relator, Myra Clark Gaines, was, and is, in all things insufficient and inadequate to warrant the court in making any order thereon against the said City of New Orleans, and inadequate and insufficient to demand any response by or from the said City of New Orleans, plaintiff in error.

2d.

That no lawful order was made upon or concerning said petition and showing of said relator.

3d.

That no rule to show cause why a writ of alternative mandamus was made in this cause, nor was any alternative writ of mandamus ever allowed, made, or issued, or served in this cause upon which any issue could be made, or lawful issue tendered the respondent herein, said plaintiff in error.

4th.

The motion to quash the order made and entered in this cause and endorsed on the petition of relator should have been sustained and granted and not overruled.

5th.

The return of the said respondent, the City of New Orleans, to the proceeding for mandamus was in all things sufficient and complete to bar all relief by way of mandamus even in case either a rule to show cause why a writ of mandamus should not issue had been laid, or an alternative writ issued, and there should have been a judgment in favor of the City of New Orleans, respondent, plaintiff in error, and against the relator, defendant in error.

6th.

There was no issue of law or fact upon the said return and response of the City of New Orleans, and the sufficiency of said return stands admitted and confessed in the record herein and should have prevailed.

7th.

That there being no issue of fact or law made and tendered about or concerning the matters set forth in the return of the City of New Orleans as made and filed, the court erred in allowing the relator to adduce or produce any proof or evidence.

8th.

That the court after ruling that the relator could introduce evidence and proofs in this cause against the averments of the return of respondent, erred further in holding that the proceeding of relator for mandamus was a proceeding in equity not at law, and in refusing for that reason a trial by jury as demanded by respondent, and in proceeding to hear the same without a jury.

9th.

The respondent, the City of New Orleans, being as averred a municipal corporation with powers to act only through its legislative department in the levy of any tax, the writ of mandamus demanded must have been directed to and laid upon each member of the council of the said city to have been effective, if lawful in any event, and the service on the mayor of the city had the proceedings been otherwise lawful and regular was not and is not sufficient, and did not bring the proper and sufficient parties in interest, and it was error to allow any writ of mandamus in this cause on simple service of papers on the mayor.

10th.

That under the laws of the State of Louisiana and the powers conferred upon the council and legislative departments of the City of New Orleans the said city could not lawfully, as a voluntary act, levy or collect the tax demanded in this proceeding; and it was error in the court to compel by mandamus the levy and collection of a tax which was and would have been unlawful had the same been levied by the voluntary act of the City of New Orleans or its mayor and council.

11th.

That in and by the record herein on the face thereof there should have been judgment against the relator and in favor of the plaintiff in error herein.

And the said plaintiff in error doth assign all of said matters as errors herein as well as other manifest errors to its prejudice appearing on the face of said proceedings and record, and prays this honorable court that said order, judgment, and decree of the circuit court may be overruled and reversed, and justice done in the premises; and will ever pray, &c.

CHAS. F. BUELL, [BUCK] *City Attorney.*

J. R. BECKWITH,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

Nos. 47 and 48.

CITY OF NEW ORLEANS

versus

THE UNITED STATES *ex rel.* MYRA CLARK GAINES.

Writ of Error from the Circuit Court of the United States for the Eastern District of Louisiana.

Brief of Appellant. + Rlff in error

This cause has a double number of the docket, for the reason that the district judge who tried the cause insisted and held that the proceedings were in equity, compelling the city of New Orleans to take appeal to obtain *supersedeas* and writ of error to bring the cause up in such form as to give the court jurisdiction.

It is a proceeding by mandamus to compel the City of New Orleans to levy and collect a special tax to pay the decree in the case of Myra Clark Gaines vs. the City of New Orleans, on appeal to this court, being No. 183 of the present docket, under title "The City of New Orleans vs. Myra Clark Gaines," the city being the appellant. The cause cannot well be tried except with that appeal, or after that cause has been heard, as the very first assignment of error which comes up with the record, and one of the first questions made by the return of the city involves the question whether the alleged decree in the so-called equity cause No. 183 is not void on its face for want of jurisdiction in the court rendering the decree.

STATEMENT OF FACTS.

On the 5th of May, 1883, the circuit court rende
cree in favor of the relator in an alleged equity caus
sum of $1,925,667.83 damages, and $34,000 costs, for th
tort of "keeping the complainant out of the posse
realty, the defendant not being in possession during a
period covered by the decree. The decree, the bill,
replication and opinion of the judge rendering the dec
the record, both as exhibits to the relator's petition an
of the bill of exceptions in the case.

This proceeding was for mandamus to compel the
special tax to compel payment of decree, costs and inte
$40,000 said to have been attached by garnishee proces

The petition alleges the decree in favor of the relat
ing the decree a part of the petition.

"That the cause of such judgment and decree con
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petitioner in the month of ---- ----, 1834, when it ente
the possession of a part of the "Blanc Tract" in the sai
New Orleans, to pay your petitioner the fruits, rents a
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indicate some recovery in an action at law, trespass to
for breaking a close.

That by legislation referred to as act 71, pamphlet
of the acts of 1852 of the State, the city assumed pay
whatever obligations came from this "implied contra
became liable therefor.

That the "judgment" has been duly registered
comptroller of the city as required by the act of 1870,
fa. prohibited by this act has been issued and is sti
hands of the marshal. That payment has been refus

garnishee process laid on $40.000 which she is willing to credit on the decree when realized.

That the city denies its liability to levy any special tax to pay the decree, and refuses so to do.

The prayer is for a mandamus to the city to levy and collect a special tax upon all of the taxable property in the city to pay the decree, and for a citation to the City of New Orleans.

It is doubtful if a more wretched showing for mandamus to levy a two million tax was ever presented to any court. What the contract "implied" in character which was to overrule statutes and consitutional limitations on the power of the city to tax was in terms does not appear, except that it was "implied."

This petition was presented to the district judge holding the circuit, and he made the following endorsement at the foot of the pleading:

Let an alternative writ of mandamus issue herein as prayed for, returnable on Tuesday, the 12th day of June, 1883, at 11 o'clock, A. M.

June, 6th, 1883. EDWARD C. BILLINGS.

Judge.

No such alternative writ was ever sealed or issued, but the Marshal's return shows that on the 6th of June, 1883, he served a copy of the petition for mandamus on the mayor. It does not appear by the return that any copy of the order of the judge was ever served on any persons, but the probability is that it was endorsed on the petition, and a copy of the order served with a copy of the petition, but service was made only on the mayor of the city, and not upon the members of the legislative body that must be set in motion to levy any tax.

On the 11th of June, the city filed a motion to quash the petition, and order appearing *pro hac vice*, for the reason that no proper case for mandamus, alternative or peremptory, was made, and that if in any event the relator was entitled to any writ, she could not compel legislative action in the city council

STATEMENT OF FACTS.

On the 5th of May, 1883, the circuit court rendered a decree in favor of the relator in an alleged equity cause, for the sum of $1,925,667.83 damages, and $34,000 costs, for the alleged tort of "keeping the complainant out of the possession" of realty, the defendant not being in possession during any of the period covered by the decree. The decree, the bill, answer, replication and opinion of the judge rendering the decree are in the record, both as exhibits to the relator's petition and as part of the bill of exceptions in the case.

This proceeding was for mandamus to compel the levy of a special tax to compel payment of decree, costs and interest, less $40,000 said to have been attached by garnishee process.

The petition alleges the decree in favor of the relator, making the decree a part of the petition.

"That the cause of such judgment and decree consisted of an implied contract made by the City of New Orleans with your petitioner in the month of ——— ——, 1834, when it entered into the possession of a part of the "Blanc Tract" in the said city of New Orleans, to pay your petitioner the fruits, rents and revenues which might have been gathered therefrom had your petitioner not been hindered and prevented from getting the possession of her premises by said City of New Orleans and its successors." A not over clear specimen of pleading, but seems to indicate some recovery in an action at law, trespass to realty or for breaking a close.

That by legislation referred to as act 71, pamphlet edition of the acts of 1852 of the State, the city assumed payment of whatever obligations came from this "implied contract," and became liable therefor.

That the "judgment" has been duly registered with the comptroller of the city as required by the act of 1870, and a *fi. fa.* prohibited by this act has been issued and is still in the hands of the marshal. That payment has been refused, but

garnishee process laid on $40.000 which she is willing to credit on the decree when realized.

That the city denies its liability to levy any special tax to pay the decree, and refuses so to do.

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without mandamus upon the council, or the members of the council not made parties to the proceedings. That no alternative writ of mandamus or rule to show cause why peremptory mandamus should not issue, had been laid and no issue tendered to the city in any form, entitling it to protect its rights by due, and regular pleading.

This motion was heard on the 12th of June, and overruled with an order, that so much of the motion as questioned the sufficiency of the showing for the writ should stand as return.

The city then made return, making all of the objections to the proceedings contained in the motion to quash. The return is set out on page 5, et seq., of the record, and we refer to the printed record for its contents to avoid repeating.

The return, aside from issues growing out of error in procedure denies that the relator is or ever was a contract creditor of the city of New Orleans.

That the act which the relator sought to compel was not ministerial, about which the legislative body of the city had no discretion, but sought to compel the performance of an act which was expressly prohibited by law in the legislation of the state on the subject of taxation, and the acts conferring power on the council under the statutes and state constitution.

That the pretended decree sought to be enforced, was a decree not based on contract, but the alleged punishment of the city for alleged torts and wrongs, continuing from 1834 to the present as alleged, that for the payment of such a judgment or decree for money, the relator was, like all other creditors of that class, dependent upon legislative discretion and confined to such provisions as the legislature saw fit to make, and that the Act of 1870 was binding upon the relator.

A statement of the number of judgments registered under the act of 1870 was made an exhibit with the return; also the ordinances of the city estimating revenues and expenses.

To this return the relator never plead or made any written issue, and the cause was sent to trial in that form.

When the cause was called for trial the respondent demanded trial by jury. This was refused, the court holding that the cause was not a cause at law, but a proceeding in equity, and that the respondent was not entitled to a trial by jury. To this ruling the respondent excepted, and the relator produced the testimony set forth in the bill of exceptions set forth in the record, commencing on page 42 and ending on page 100 of the record. This was all of the evidence adduced on the trial and all taken under exception, the relator claiming that all of this matter had been made exhibit to the petition for mandamus.

The court thereupon ordered a peremptory mandamus, filing a written opinion. Rec. 100 *et seq.*

We deem it safe to submit the cause on the assignment of errors sent up with the record and the opinion of the court, so manifest seem the errors of reasoning and law in the opinion, and under ordinary circumstances should do so, yet the large interest of a large number of persons in the litigation and the large amount involved, lead us to trespass on the court and state some of the reasons why the judgment is void, or at least voidable, and ought to be so declared.

For assignment of error, we rely upon the formal assignment sent up with the record, printed on page 121 of the printed record.

The first assignment is that the showing made by the relator is insufficient in law to warrant or authorize mandamus.

There can be no doubt that the rule is that mandamus can not be used, or resorted to, to compel legislative action, unless the act commanded is purely ministerial in character and concerning which the person or legislature commanded have no discretion or volition, and that the act commanded be a prescribed duty.

The imposition of a municipal tax of the character sought to be compelled in this cause is an act of legislation or involves legislation to make the act legal or the tax enforcible.

The showing to be made must be: 1st. a judgment or decree of a character warranting the levy of a special tax to satisfy the demand. 2d. A legislative mandate commanding the legislative department of the city to levy the tax, or contract rights involved in the decree, or the facts on which the decree is based, making it a part of a solemn contract, that the decree be discharged by the levy of a tax.

The date of the decree set up is May 5th, 1882. It is not contested that the statute limiting taxation of the city to two per centum for all municipal purposes, as stated in the return to the petition for mandamus, as well as article 209 of the state constitution, was in force at the date of this decree, or at least cannot be successfully disputed. Nor can it be disputed that one per centum of the levy, or one-half of the tax, is, by law and express consignment, dedicated to the payment of the funded debt, or interest on the debt, and that 25 per centum of the remaining one-half of the levy is set apart for improvement fund, leaving the city for the current expenses, police, etc., but seventy-five per centum of one-half of the entire authorized levy of two per centum on assessed value. The limit on taxation by article 209 of the constitution is ten mills on each valuation of assessable property; the other ten mills in excess was beyond the reach of limitation by reason of being part of the contract of the bonds issued prior to the adoption of the constitution of 1879.

There, then, was no authority given by the law to the city to levy a special tax to pay this "judgment or decree," as it is called in the petition, or making it a duty to pay a decree in that form.

In order to show a right to a tax, it devolved on the relator to show a decree based upon some contract prior to the limitation placed on taxation, and that the contract merged into decree had as one of the stipulations an obligation to levy a tax to discharge the debt.

What is the averment of the relator in this respect? The averment is that the decree is based upon an "implied contract," made in 1834, growing by implication out of torts committed by the city in preventing relator from getting possession of her premises. The averment is not that the city held *adverse possession* of her premises, but by broadest intendment means that by some wrongs or torts the city kept her from evicting other persons from her premises; this, on its face, is simple tort which created no legal obligation, taking the form of a debt, until it reached the form of a judgment. The debt, then, as set up, is the debt growing out of the decree, and as a debt in any legal sense in which the word can be used no older than the decree. It was disputed as a liability up to that moment, and is disputed yet on appeal from the decree.

A contract involves the agreement of two minds, a convention of parties.

In the decree set up the very bill on which it was based declares that there was no convention on contract, and nothing to carry it back of the date of the decree as a debt of the city: by the terms of a contract, or that the supposed debt is created by contract and dates from the date of an agreed liability.

The decree set up is void on its face; not only voidable, but void.

The bill discloses absolute want of jurisdiction. If there is no equity in the bill, there was no jurisdiction in the court.

The bill is filed to punish the city for an alleged tort, or rather a series of torts, naked torts. The opinion of the district judge, filed with the judgment in this case (Rec 100), places the demand as a demand growing out of torts, not contract.

The burden of showing some contract upon which mandamus for tax would lay was on the relator. If the bill offered in evidence is true, the will under which she alone could claim title, and does claim title, was not probated until 1856, up to that time she had no title to which any holder of her alleged estate was compelled to yield. Up to that time she claimed as

assignee of her mother's alleged community right as widow in community, and four-fifths of the balance as forced heir of Daniel Clark.

The court, in Gaines vs. Relf, 12 How. p. 472, decided in 1851, declared her alleged title void, and found her of a class incapable of inheriting.

She did not attempt the probate of the pretended will of 1813 until 1856. Therefore she could not have been hindered in getting possession of her estate by the City of New Orleans until 1856. When she filed her bill against the City of New Orleans, in 1856, setting up title as universal legatee, she, for the first time, asserted a title to which any one was compelled to yield.

We have, therefore, only to look at the legislation from 1856 down.

In 1856 the city was under a charter granted in 1852 published in the session laws of that year. The 42d and 121st sections of that act limited the taxation of real and personal property to one dollar and fifty cents for all purposes, except in case of invasion and insurrection, and in case the levy was insufficient to pay the interest on the bonded debt. This limitation continued up to the adoption of the charter of 1870, when by section 12 of that act, 20th subdivision of the section, the limit of taxation for all purposes except in case of invasion and insurrection was fixed at one dollar and seventy-five cents per one hundred dollars, with the same proviso that it be sufficient to pay the interest on the funded debt of the city. This limitation on the power of the city to tax continued until 1876, when by the provisions of Act No. 31 of the acts of 1876, Sec. 5 (Acts 1876, pp. 54 and 55), the limit was placed back to one dollar and fifty cents per hundred of valuation on assessment.

This continued until the adoption of the charter of 1882. Act No. 58 of the session laws of 1882, when the taxation was limited to the amount shown in the return of the city on page 7, Rec., making the total maximum two dollars per hundred. This act, with Act No. 20 of the laws of 1882, constituted

the charter under which the city was governed, when the decree referred to in relator's petition was rendered. From the year 1852 down to this moment there has been an express limit on the power of the Council to levy a tax. The true state of the legislation and the acts of the City Council under the existing charter is shown in the return and not contradicted or disproved on trial.

The state of legislation relative to the enforcement of judgment and decrees for money against the city prohibited the remedy by mandamus. Act No. 5 of the laws of 1870 (Extra Session) prohibits the issue of a *fi. fa.* against the city on a money judgment, but provides for the registration of the decree with auditing officers of the city and provides how it shall be paid from a fund to be set apart for that purpose in the annual budget of the city. The final section prohibits mandamus to compel payment of money decrees. This act has been considered in this court in *Louisiana vs. New Orleans, 102 U. S. p. 203*, and the act held constitutional, in so far as registration is required, and while not passing on the question whether it impaired the obligation of a pre-existing contract, certainly would have held that it did not affect any judgment based upon a simple tort rendered years after the act became a law. Beyond doubt that it did not as to all demands of the character set up in the bill or decree disclosed in the petition for mandamus. This act was the law of remedy when the decree was rendered and when the writ of mandamus was applied for and no question of impaired contract is involved.

The question whether the decree in question is void on its face and the character of the torts set up as the basis of the decree is fully and at large considered in the brief prepared in the main case now on appeal as 183 of the docket, to which we refer, respectfully suggesting that as this cause is simply a proceeding to enforce that decree the question whether that decree is enforcible in any form is one of the questions which

must be dealt with in that case, and that the causes should be heard together and consolidated for that purpose.

The question whether the bill sets up a contract is not worthy of serious discussion. This court has clearly defined the class of contracts protected by the constitution against impairment by change of remedy in Louisiana vs. New Orleans, 109 U. S. p. 285: "*The term "contract" is used in the constitution in its ordinary sense as signifying the agreement of two or more minds for considerations proceeding from one to the other to do or not to do certain acts. Mutual assent to its terms is of its very essence.*"

A single reading of the stuff with which the bill is crammed on which the decree is based will show that so far from there being any assent to the demands of the complainant the bill rests for recovery on a string of alleged frauds called in the bill "oppressive and fraudulent," which if stated in a declaration in a common law action for tort would have been swept out on demurrer as showing no cause of action at law. By the terms of the bill the City of New Orleans was *out of possession of the estate all of the time covered by the decree*, and did not receive any rents or profits to be charged with implied contract to pay over to the complainant. The entire decree is punishment for supposed wrongs with no gleam of contract. In this respect the petition made no showing for mandamus for taxation.

That the proceeding was an action at law not in equity, is not a matter of discussion. It has been too long settled by this court.

Kentucky vs. Ohio, 24 How. p. 66.

Louis vs. Brown Township, 109 U. S. p. 177.

Memphis vs. Brown, 94 U. S. p. 715.

Ex parte, De Groot, 6 Wall. p. 497.

Ward vs. Gregory, 7 Pet. 633.

Insurance Co. vs. Wheelright, 7 Wheat. 534.

The case being at law, the refusal of the court to allow a jury trial of the issues, if any were to be tried under the pleadings

and return, was a denial of a right guaranteed by the constitution of the United States, the amount involved being over twenty dollars.

This court has by repeated determinations settled that the writ of mandamus only lies to compel acts where there is no discretion involved or can be exercised by the party to whom the writ is directed,—that the writ will only enforce an existing power and does not confer power on those to whom it is directed.

U. S. vs. County Clerk, 95 U. S. p. 769.
Board of Liquidation vs. McComb, 92 U. S. p. 531.
Reeside vs. Walker, 11 How. p. 272.
U. S. vs. Guthrie, 17 How. p. 284.
Litchfield vs. Register, 9 Wall. p. 575.
Marquez vs. Frisbie, 101 U. S. p. 473.
Decatur vs. Paulding, 14 Pet. p. 497.
Kendall vs. U. S. 12 Pet. p. 524.

We have treated this cause as if the proceedings were regular as to the parties sought to be commanded and brought into court. It was made a ground of the motion to quash, renewed in the return, and assigned for error that the showing made for writ, if rule, had been laid, or alternative writ issued was not against the proper parties: that if a tax could in any event be levied it required legislative action on the part of the common council to make the tax collectable or enforcible against property: yet the relator did not make a single member of the council, or the legislative body, a party to the action. The mayor was the only one served, and he did not possess authority to levy a tax or compel the individual members of the council to vote for or adopt the necessary ordinance.

The action should have been so brought as to compel response from the officers required to act to levy the tax, and should at least have been addressed to the council, not to the corporation generally. Queen vs. Dolgelly, Union, 8 Adolph. &

Ellis, 561; People vs. Common Council, 3 Keyes, 81; Regina vs. Mayor of Derby, 2 Salk. 436.

The proceedings, if directed to the proper parties, were irregular and insufficient, in that no proper order was made and served.

The act of 1872 adopting the state practice in cases at law, incorporated in the law of Louisiana, regulating practice as a part of the federal law. Article 841, of the Code of Practice of Louisiana, in regulating the practice in proceedings in mandamus, enacts: "The court to which the complaint is addressed, if it thinks there is ground for interposing its authority, shall issue an order addressed to the party or to the inferior judge against whom the complaint is made, by which he shall be directed to do what has been demanded of him, or show cause to the contrary, within a certain time after the service of the order, to be fixed by the court."

Article 842 prescribes the return to be made, and its effect. "If, on the day assigned for answering the order, the party or judge to whom it is directed answered and states sufficient reason to justify his conduct, the complaint shall be dismissed, and petitioner sentenced to pay costs."

This article conforms to the common law procedure prior to the statute of Anne, when the cause was tried solely on the return, leaving the relator to his action for a false return if he deemed the return untrue.

In this cause the only order ever granted was that an alternative writ issue. This was never issued, and nothing in the form of any order or writ upon which issue could be made was ever served or tendered to the respondents.

By Art. 840 of the Code of Practice the office of the petition addressed to the court is solely to make showing to the court, in order that the court may determine whether the alternative order described in Art. 841 shall be made. The respondent has nothing to do with that. The issuable paper, as far as he is concerned, is the alternative order directed to, and served on him. No such issue was tendered in this cause. The motion to quash the proceedings should have prevailed or an alternative writ been issued and served.

By the terms of the statutes governing mandamus proceedings, the trial should have been a trial of the sufficiency of the return. If the return is sufficient, and, as in this cause, not overthrown by proof, or even attempted to be disputed as to facts set up, the peremptory writ should have been refused. The statutory provision that if "the party or judge to whom it (the order) is directed, answers and states sufficient reason to justify his conduct, the complaint shall be dismissed, and the petitioner sentenced to pay costs," is conclusive on this question.

The return, uncontradicted, shows no duty to levy any special tax, and no power to increase the rate of general taxation in the interest of this special decree.

State vs. City of Davenport, 12 Iowa, p. 335.

High on Extraordinary Remedies, p. 261, and § 368 to 377, inclusive.

The appellant insists upon all the assignments of error.

This brief is filed to comply with the rule, with no certainty that the cause after the suggestion of the death of the defendant in error or relator, and the order of publication, will be heard at this term. The representatives of the estate of the relator have neglected or refused to voluntarily make the necessary parties, and we are unable to obtain any definite answer as to any intention to voluntarily appear, and respectfully insist that the motion for the consolidation of this cause for trial with the City of New Orleans vs. Gaines, No. 183 of the docket, should prevail, to prevent or avoid double discussion of the most important issues, the decree in that cause being the decree sought to be enforced in this.

While it is undoubtedly the law, that in mandamus to enforce a decree or judgment, the court will not inquire into the validity of a decree to determine whether it is *voidable*, and that in a decree voidable only the inquiry will only go so far as to determine upon what it is based so far as that inquiry is necessary to determine whether it is based upon a contract right coupled with a right to special taxation for its enforce-

ment. There can be no doubt of the fact that such inquiry in this cause will show that the decree sought to be enforced in this cause is absolutely void for want of jurisdiction *ratione materia* in the court rendering the decree, there being no gleam of equity cognizance disclosed in the bill, and as complete want of authority in the court as if the court had attempted to deal with a cause between citizens of the same state where jurisdiction did not come *ratione materia*, or if the amount at issue had been less than five hundred dollars. The want of jurisdiction of the courts to deal with the cause in which the decree sought to be enforced is rendered as a cause in equity is just as apparent on the face of the bill as would be the defect in jurisdiction in any of the cases above stated. Most certainly this court would not lend its power to enforce a decree *void* on its face, and always subject to collateral attack, under all circumstances, where it is set up as the basis of a right. This question must be dealt with elaborately and in detail in the case in which the decree was made, and we respectfully submit that this cause should be heard with the main appeal. Reserving the right to file a more elaborate presentation of the case and the authorities when the cause shall have proper parties, which seems now unlikely to occur before the next term of the court, we respectfully ask that the judgment of the ~~district~~ Circuit court be reversed.

J. R. BECKWITH,
Counsel for Appellant.

Dept on Ern

Supreme Court of the United States.

OCTOBER TERM 1887.

No. 4.

THE CITY OF NEW ORLEANS, Appellant,

vs.

THE UNITED STATES Ex Rel. MYRA CLARK GAINES, Appellee.

No. 5.

THE CITY OF NEW ORLEANS, Plaintiff in Error,

vs.

THE UNITED STATES Ex Rel. MYRA CLARK GAINES, Defendant in Error.

THOS. J. SEMMES,
ALFRED GOLDTHWAITE,
Counsel for Heirs of Mrs. Gaines.

Press of Thomas McGill & Co., Washington, D. C.

Supreme Court of the United States.

October Term 1887.

No. 4.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

THE UNITED STATES EX REL. MYRA CLARK GAINES, APPELLEE.

No. 5.

THE CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES EX REL. MYRA CLARK GAINES, DEFENDANT IN ERROR.

This proceeding was a petition by Mrs. Myra Clark Gaines, the relatrix, for a mandamus in aid of the process of the United States Circuit Court in and for the Eastern District of Louisiana, against the City of New Orleans, the Common Council thereof, and each and every member of the same, and against each and every officer of the said City whose duties relate to the assessment and collection of taxes, directing and requiring them to levy and apportion a tax upon all the taxable property within the said City of New Orleans, sufficient in amount, after making the same allowance for insolvencies and delinquencies as the law makes for general purposes, to pay the relatrix, or her attorneys of record,

the amount of judgment recovered by her in that Court on the 5th day of May, 1883, in the suit entitled Myra Clark Gaines *v.* The City of New Orleans, No. 8825 on the docket of that Court, which said judgment has been appealed to this Court, and is numbered 15 on the October Term 1887 docket of this Honorable Court, the sum of one million nine hundred and twenty-five thousand six hundred and sixty-seven dollars eighty-three cents, with five per cent. interest per annum on the sum of nine hundred and fifty thousand one hundred and ten dollars from the 10th day of January, 1881, until paid, and in the further sum of thirty-four thousand dollars costs, with five per cent. per annum interest thereon from the 10th day of January, 1881, until paid, and costs of Court in said No. 8825 on the docket of the Circuit Court, the said City of New Orleans to be credited on the said judgment with what may be realized from the writ of garnishment, which had previously been issued.

The petition referred to the judgment which had been rendered in the case No. 8825 and made it a part of the petition to be used on the trial. It averred that the said judgment was final and executory, and was a valid charge upon the City of New Orleans. The petition averred that the cause of the judgment and decree consisted of an implied contract made by the City of New Orleans with the relatrix, Myra Clark Gaines, then Myra Clark Whitney, in the month of September, 1834, when it, the said City, entered into the possession of the property known as the "Blanc Tract," in the said City of New Orleans, to pay to the relatrix the fruits, rents, and revenues which might have been gathered therefrom had the petitioner and relatrix not been hindered and prevented from getting the possession of her said property by said City of New Orleans and its successors.

It further averred that by the act No. 71 of the

Pamphlet Acts of 1852 of the State of Louisiana, known as the act consolidating the three Municipalities into the City of New Orleans, the said City of New Orleans assumed the payment of said obligation to the relatrix and became liable therefor.

It averred the non-payment of the judgment and decree; the proper registration of the judgment with the Controller of the City of New Orleans; the issuance of a writ of *fieri facias* and a demand by the United States Marshal of the District upon the proper officer of the City for the payment of the said judgment, and the refusal of the City through its proper officer; the subsequent garnishment of third persons supposed to have property belonging to the said defendant in their possession, particularly to the extent of forty thousand dollars, and petitioner's willingness and readiness to have the writ of mandamus defined and limited to the collection of a tax sufficient to pay what remains of her said judgment after it has been credited with what may be realized from said writ of garnishment.

It averred that the City of New Orleans had no property other than the forty thousand dollars seized as above stated subject to execution; that executions similar to that of relatrix had been frequently issued and returns made thereon,—no property found. That the City denied its liability upon the said judgment, or to collect any tax to pay the said debt of the City, and would make no effort to pay the same; that no money can be made by any ordinary process of the Court, as the City had no property subject to execution; and lastly, that the said conduct on the part of the City was wilful and mischievous and a great wrong to relatrix.

The petition was filed on June 6th, 1883.

The service was duly made upon the Mayor of the City of New Orleans on June 7th, 1883, by handing a copy of the petition to him. The petition had been sworn to, and an order upon it had been made that an

alternative writ of mandamus issue as prayed for, returnable on Tuesday, the 12th day of June, 1883.

On June 11th the City Attorney, appearing for the City of New Orleans, *pro hac vice*, filed a motion to quash the petition and set it aside for causes and reasons apparent on the face of the proceedings.

When the motion to quash was heard it was refused, and that part of the motion which referred to the insufficiency of the allegations of the petition was referred to the return. (Printed Record, p. 5.)

On the 12th June the City made a return by way of exceptions and answer.

The defenses set up were that relatrix had no right to issue execution, because within ten days after the rendition of the judgment in the case No. 8825 the City applied by motion for an appeal to the Supreme Court of the United States, to operate as a *supersedeas*, which motion was granted and the bond fixed; that no execution could issue upon the judgment within sixty days after the rendition of the judgment, the motion for appeal having been allowed and amount of bond fixed.

2. That no mandamus could issue until the Marshal had returned the writ of *fieri facias* unsatisfied and all other remedies had been exhausted.

3. That no mandamus could be allowed to compel a levy of a tax which is not directed to the Common Council and the members thereof, the legislative power of the City being vested in the Council; and that no relief could be granted to relatrix because the Council was not a party to the proceeding.

4. That the proceeding was illegal, because there was no rule to show cause, and because no alternative writ was ever issued.

5. That the petition of relatrix shows no cause or basis on which the writ ought to issue.

6. That there is no law authorizing a tax as claimed by relatrix, and that no mandamus can issue to enforce

any tax not directed by law. And further, that there is positive law in Louisiana prohibiting any such tax as is claimed by relatrix from being levied. (Pp. 5, 6, 7, 8.)

The City annexed to its answer a list of judgments registered against the City at the Comptroller's Office, aggregating nearly $900,000 prior to the registration of the Gaines judgment and entitled to priority of payment over the Gaines judgment. (Pp. 9, 10, 11, 12, 13, 14, 15, 16.)

The relatrix offered in evidence in support of her petition—

1. The record proper in case numbered 8825 (now No. 15 on appeal to this Court), consisting of the bill, the amended bill, the answer to bill and amended bill, the replication to the same, the opinion of the Court, and judgment of May 5th, 1883.

2. The writ of *fieri facias* in said case No. 8825, and return thereon, so far as made by the Marshal, the same having been produced by E. S. Wurzbruger, Deputy Marshal.

3. The garnishment proceedings and answers of the garnishees in said suit 8825.

4. The returns of the marshal in the writs of *fieri facias* in suits numbered 10,213, 8535, 10,193, 10,183, 9697, 9731, 1009, 9933, 10,149, 10,081, 10,082, 9899, 10,041, 9774, 9666, 9813, 9790, 9768, 9544, 9351 and 9444 on the docket of the Circuit Court. These returns are omitted from the transcript under a stipulation made between the solicitors of record that the marshal's return in the writ of *fieri facias* in case of James H. Young *v.* City of New Orleans, No. 10,213, and copied into the transcript, (pp. 99–100), is the same as the return of the Marshal in those cases, except as to the name of the plaintiff in execution, and that said writs of *fieri facias* were all issued between the dates November 1, 1880 and May 12, 1883. (P. 120.)

The return of the marshal upon the writ of *fieri facias* in No. 8825 is found at page 75.

Upon the trial, the City of New Orleans claimed the right of trial by jury, which the Court, upon objection by counsel for relatrix, refused, upon the ground that the proceeding, though in form of a suit of mandamus, was in fact a proceeding in a cause in equity, and liable as such, to which ruling a bill of exceptions was taken by the counsel for the City of New Orleans. (Pages 22, 23.)

On the 18th of June, 1883, Judge Billings delivered an opinion granting the peremptory writ of mandamus as prayed for. (Pp. 100 to 108.)

The decree was entered on the 19th June, (pp. 108–9,) and on the 21st June the writ was issued. (Pp. 110, 111.)

II.

In this Court eleven errors are assigned.

1. That the allegations of the petition were insufficient on their face.

2. That no lawful order was made upon the petition.

3. That no order was made or rule taken, or alternative writ issued, upon which issue could be taken.

4. That the motion to quash should have been maintained.

5. That, if the petition was sufficient and the order regular, the judgment should have been for respondent.

6. There was no issue of fact or of law upon the return made, and hence the mandamus should have been refused.

7. As there was no issue of fact or law, that no evidence should have been allowed.

8. That the proceeding was one at law, and not in equity, and a jury should have been allowed.

9. That service upon the Mayor was not sufficient to bring the Common Council and the proper officers of the City into Court.

10. That the City of New Orleans could not levy or collect the tax demanded in the petition as a voluntary

act, and therefore that no Court could compel them to do so.

11. A general objection to the judgment.

III.

The errors may be classed as objections to the form and to the substance.

In this order we will consider them.

The petition was full and asked for process against all who were necessary to be commanded. The prayer was that citation issue to the City. A copy was served on the Mayor in person.

In suits against the corporations of cities, service is made on the Mayor if practicable. (Code of Practice, Art. 198.)

In Louisiana the absence of form is not fatal when the facts set forth in the petition disclose a right to the writ and there is a proper prayer for it. (Morris *v.* Womble, Sheriff, 30 An., 1312; Malain *v.* Judge, 29 An., 793.)

The absence of the alternative writ is no reason for setting aside the writ; the City was duly cited, had full notice and defended. (Knox County *v.* Aspinwall *et al.*, 24 Howard, 376.)

The decree allowing the peremptory writ was against the City of New Orleans, the Council thereof, and each and every member of the same, and each and every officer of said City whose duties relate to the assessment or collection of taxes.

So runs the writ. Service was made on the officers of the City and every member of the Council except Patorno, who was absent from the City. (Pp. 108 to 113.)

IV.

The 8th assignment of error is that the Court erred in holding that the proceeding of relatrix for mandamus was a proceeding in equity, not at law, and in refusing

a trial by jury and in proceeding to hear the same without a jury. There is a bill of exceptions to the same effect. (P. 22.)

The judgment to be satisfied by the tax was a money decree in the equity case. We assume that a Court of Equity had complete jurisdiction of the case which resulted in the judgment. This Court has by express determination held that the jurisdiction of a Court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. (Riggs *v.* Johnson County, 6 Wall., 166; Rhode Island *v.* Massachusetts, 12 Peters, 718)—in the former case, Justice Clifford saying, "Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment." (Wayman *v.* Southard, 10 Wheaton, 23; Suydam *v.* Williamson, 20 How., 437.)

In the Federal Courts the writ is not a prerogative writ, but like an ordinary case, and is always ancillary. This Court, in Riggs *v.* Johnson County, 6 Wall., 166, described it as "a proceeding ancillary to the judgment which gives jurisdiction, and, when issued, becomes a substitute for the ordinary process of execution to enforce the payment of the same as provided in the contract." (See Labette County Comrs. *v.* Moulton, 112 U. S., 217.)

By Rule 8, Equity Rules, plaintiff in 8825 had a writ of execution or *fieri facias.*

Under the line of cases of Hyde *v.* Krippendorf, 110 U. S., 276, and authorities there cited, the mandamus was simply supplementary.

It will be observed that in Louisiana there is no distinction of law and equity in the organization of courts.

By the Code of Practice, Art. 829, referring to the writ of mandamus: "This is an order issued in the name of a State by a tribunal of competent jurisdiction and addressed to an individual or corporation or court of inferior jurisdiction, directing it to perform some

certain act belonging to the place, duty, or quality, with which it is clothed."

Art. 830: "The object of this order is to prevent a denial of justice or the consequence of defective police, and it should therefore be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong or an abuse of any nature whatever."

Art. 831 provides that it may issue even where a party has other means of relief, "if the slowness of ordinary legal forms is likely to produce such a delay that the public good and the administration of justice will suffer from it."

If the judgment had been obtained in a Court of Law plaintiff in judgment would have been entitled to a writ of mandamus to aid in the execution of the judgment.

But it is contended that a Court of Equity cannot issue the writ because there is no precedent for it. In 1843, when the Rule 8 of Equity Rules was promulgated under the statute of 1842, the intention, we submit, was clear to give to any one having a decree for money the same final process for collecting the money that he would have had in a suit of *assumpsit* at common law. The judiciary act of 1789, Sec. 14, gave to all the Courts recited in the act "the power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law." No law prohibits the granting of writs of mandamus by a Court of Equity, and there can be assigned no reason why a Court of Equity should not control its own process as effectually as any other Court. That a jury, in a new proceeding, an original case, should defeat or circumscribe the process of a Court of Equity would be anomalous. The grant of the power to issue the

writ of execution to a Court of Equity implies the grant of full power to execute the writ and to make it effective. The right to revise the judgment by appeal is left to the defendant corporation, and no harm will come to it if it was wrongfully issued, which cannot be corrected by appeal.

V.

As to the objection that no return had been made upon the writ of execution, the proof shows that the Mayor had said to the Deputy Marshal that the city had no property with which to satisfy this decree, in whole or in part. Numerous executions had been returned, "No property." The City in its return showed nearly $900,000 of judgments registered ahead of relatrix's judgment, and unsatisfied, and that all of the revenues from taxation were used as alimony by the City, or in paying the interest on its bonded indebtedness. The proof of the inability and unwillingness of the City was abundant. The judgment had been duly registered in the office of the Comptroller under Act No. 5 of Pamphlet Acts, Extra Session, 1870.

VI.

IS THE RELATRIX ENTITLED TO THE WRIT OF MANDAMUS ON THE PETITION AND PROOFS MADE ON THE TRIAL OF THE CASE?

The basis of the suit, now No. 15, on appeal in this Court, and upon the judgment in which case we are asking for the writ of mandamus, is, that in 1834 the City of New Orleans, in bad faith and as an usurper, went into possession of the property of the relatrix; that under the law of Louisiana the rents, revenues, and value for use are by right of accession a part of the property entered upon, and do not belong to the simple possessor, but belong to the true owner; that rents, reve-

nues, and value for use are not only what were actually earned, but are what ought to have been earned and received by a prudent father of a family; that by operation of law the City of New Orleans was as much bound to restore them to the true owner as if there had been an express contract, and that being liable not only for the time she (the City) was in possession and occupied, but as well for all the mesne possessions of those deriving title through the City, and up to the time of eviction by Mrs. Gaines, that the obligation was a continuing one.

By operation of law in Louisiana, the buyer has against the seller who has sold a thing to him with a promise of warranty, or when no stipulation was made on that subject, if the buyer be evicted, a right to claim against the seller the restitution of the price. (Art. 2506, Rev. Civil Code, 1870.)

Numerous buyers from the City of New Orleans in the sales of 1837 have recovered the prices paid to the City at that time.

After judgment in one instance and upon proof that the judgment could not be otherwise collected, a mandamus was allowed requiring the City to levy a tax to pay the judgment. (State *ex rel.* Carriere *v.* City of New Orleans, 36 An., 687.)

The Supreme Court of Louisiana had said in the case of Rousseau *v.* City of New Orleans, 35 An. 557, "The usual and ordinary source to which creditors of a municipal corporation look for satisfaction of their debts, is the power of taxation. The potent and substantial remedy for the enforcement of municipal obligations is to be found in the compulsory exercise of that power within its lawful limitations."

If there is an obligation to pay to the buyer the price, and that obligation can be enforced by mandamus, why should not the obligation to restore the accessions to the property be of equal rank and entitled to the same

remedy? "The ownership of a thing, whether it be movable or immovable, carries with it the right to all that the thing produces, and to all that becomes united to it, either naturally or artificially. This is called the right of accession." (C. Code, art. 498.)

The basis of the suit in equity is not damages, as the learned solicitor for the City would have the Court to believe. The taking of the property of Mrs. Gaines may have been a wrong, but fruits and revenues collected, or not collected by the City because it neglected to do so, are not damages arising from a tort. It would unnecessarily enlarge the proportions of this brief to go over the argument and authorities in the briefs filed in the equity case.

As the learned counsel for appellant asks to have the mandamus and equity cases consolidated and heard together, we express the hope that that course will be pursued; and if a motion shall be addressed to this Court to that end, we will acquiesce in behalf of the heirs of Mrs. Gaines.

In the case of Saloy *et als. v.* City of New Orleans (33 An., at p. 84), the Court said:

"But, as already indicated, the power of taxation required to meet the antecedent contract obligations of the City is not derived from and controlled by that Constitution (1879). It was derived from valid legislative authority existing or created at the time of such contracts, entering into and forming part of those contracts, and incapable of being affected or destroyed by any action of the State."

The contract relations between Mrs. Gaines and the City of New Orleans commenced from the time the City was a possessor in bad faith of the property belonging to Mrs. Gaines.

There is no contention that there was any limitation upon the power of the City to tax before the year 1852.

By the Act of March 8, 1836, found at page 28 Pam-

phlet Acts, 1836, the old City of New Orleans was divided into three Municipalities, each with distinct municipal powers, and the debt of the old City was apportioned upon an equitable basis.

By the Act No. 71, found at page 42 of Pamphlet Acts, Louisiana, 1852, the three Municipalities were consolidated into the one corporation of the City of New Orleans. By section 37 of that Act it was enacted "that the debt of the general sinking fund, commonly called the old city debt, and the debts of the three Municipalities, whether in the form of bonds, notes, interest coupons, cash warrants, or any other species of obligation whatever, shall be assumed and paid by the City of New Orleans, and the said City is hereby declared liable therefor." This charter continued until the charter of 1870, found in Act 7, at page 30, Pamplet Acts, extra session, 1870. There was a limitation in each charter to one dollar and fifty cents and one dollar and seventy-five cents, respectively, on the one hundred dollars of real and personal property, with the same proviso that it be sufficient to pay the interest on the funded debt of the City.

By Act No. 31 of the Acts of 1876, section 5, pp. 54, 55, the limit was placed back to one dollar and fifty cents per hundred dollars.

By Act No. 58 of Acts 1882, the total maximum of taxation was fixed at two dollars per hundred dollars.

Now, if there was a liability in 1837 and in 1852, under a relation of contract, the subsequent legislation could not impair the obligation of the City to pay Mrs. Gaines. (Green *v.* Biddle, 8 Wheaton, U. S., 1.)

Under the Code of Practice in Louisiana, the power of Courts to issue writs of mandamus is more extensive than that of tribunals governed by the common law. (Hatch *v.* Bank, 1 Rob., 470.)

The law regards the application for a mandamus as summary in its nature, and the answer in opposition

thereto should contain a full written defense, whether it involves exceptions or merits. The splitting up of a defense should not be tolerated in practice. (Shaw *v.* Howell *et al.*, 18 An., 195.)

In the case of Borgstede *v.* Clarke (5 An., p. 291) it was held that it is not necessary to traverse the returns to a mandamus before going to trial on the merits.

VII.

It has been repeatedly held in Louisiana that no officer of corporations can, without special authority, legally represent the body before the Courts or stand in judgment for the same.

Police Jury of Ouchita *v.* City of Monroe, 38 An., 630.

Helluin *v.* Maurin, 8 Louisiana, 111.

Capmartin *v.* Police Jury, 19 An., 448.

The citation and copy of the petition were served on the Mayor, the executive and representative of the Corporation, on whom process must be served when practicable. The Council is only one branch or department of the City Government. The case is not unlike the power of the board of liquidation of the City debt. (See Board of Liquidation *v.* L. & N. R. R., 109 U. S., 221.)

When a peremptory writ is issued, it is proper that it should be directed to and served upon those charged with the performance of the duty.

The reason is clear, we submit, that the City, as a corporate body, should have notice to defend; the Council should be specially and individually served with the peremptory writ, because each and every one of the Council, together with other officers, is charged with the performance of the duty, and liable to personal and individual punishment for contempt of the process of the Court. We do not understand that any of the de-

cisions has gone further than requiring the peremptory writ to be served upon each and every officer charged with the performance of the duty.

VIII.

As to the Act No. 5, Pamphlet Acts, 1870: Both this Court and the Supreme Court of Louisiana have determined that, so far as the act prohibits the granting of a writ of mandamus, it is unconstitutional, null, and void.

Wolf *v.* New Orleans, 103 U. S., 358.
State *ex rel.* Morris Ranger *v.* City of New Orleans, 34 An., 1149.
St. *ex rel.* Carriere *v.* City of New Orleans, 36 An., 687.

The City of New Orleans was incorporated under the name of "Mayor, aldermen, and inhabitants of the City of New Orleans" by an act of the Legislature approved February 17th, 1805, the sixth section of which provides—

"The said Mayor and City Council (aldermen) shall have power to raise by tax, in such a manner as to them may seem proper, upon the real and personal estate within said City, such sum or sums of money as may be necessary to supply any deficiency for the lighting, cleaning, paving, and watering the streets of said City, for supporting the City watch, the levee of the river, the prisons, work-houses, and other public buildings, and for such other purposes as the police and good government of the City may require."

An act approved March 8th, 1836, amending that act, constituted in effect a new charter and divided the City "into three separate sections, with distinct municipal powers." The fourth section provided—

"Each of said Municipalities shall possess separate corporate rights, and are hereby declared to be distinct

corporations, and *shall possess generally such rights, powers, and capacities as are usually incident to municipal corporations* * * * and in general shall possess and exercise within their respective limits all such powers, rights, and privileges as are now possessed by the Corporation of New Orleans."

"The power of taxation is a power incident to such a corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the Legislature empowers the corporation to do is presumably for its benefit, and may in "the proper government of the same" be done. Having the power to levy a tax for the payment of the judgments of the relator, it was the duty of the City through its authorities to exercise the power. The payment was not a matter resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a mandamus should have been issued to enforce its performance."

United States *v.* New Orleans, 98 U. S., p. 397.
Knox Co. *v.* Aspinwall, 24 How., 376.
Von Hoffman *v.* City of Quincy, 4 Wall., 535.
Memphis *v.* Brown, 97 U. S., 300.
Memphis *v.* Brown, 94 U. S., 715.
United States *v.* Memphis, 97 U. S., 284.
Memphis *v.* United States, 97 U. S., 293.

Respectfully submitted.

THOS. J. SEMMES,
ALFRED GOLDTHWAITE,
Counsel for Heirs of Mrs. Gaines.

31-197

OCT 3 1887

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. ~~15.~~ 4

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

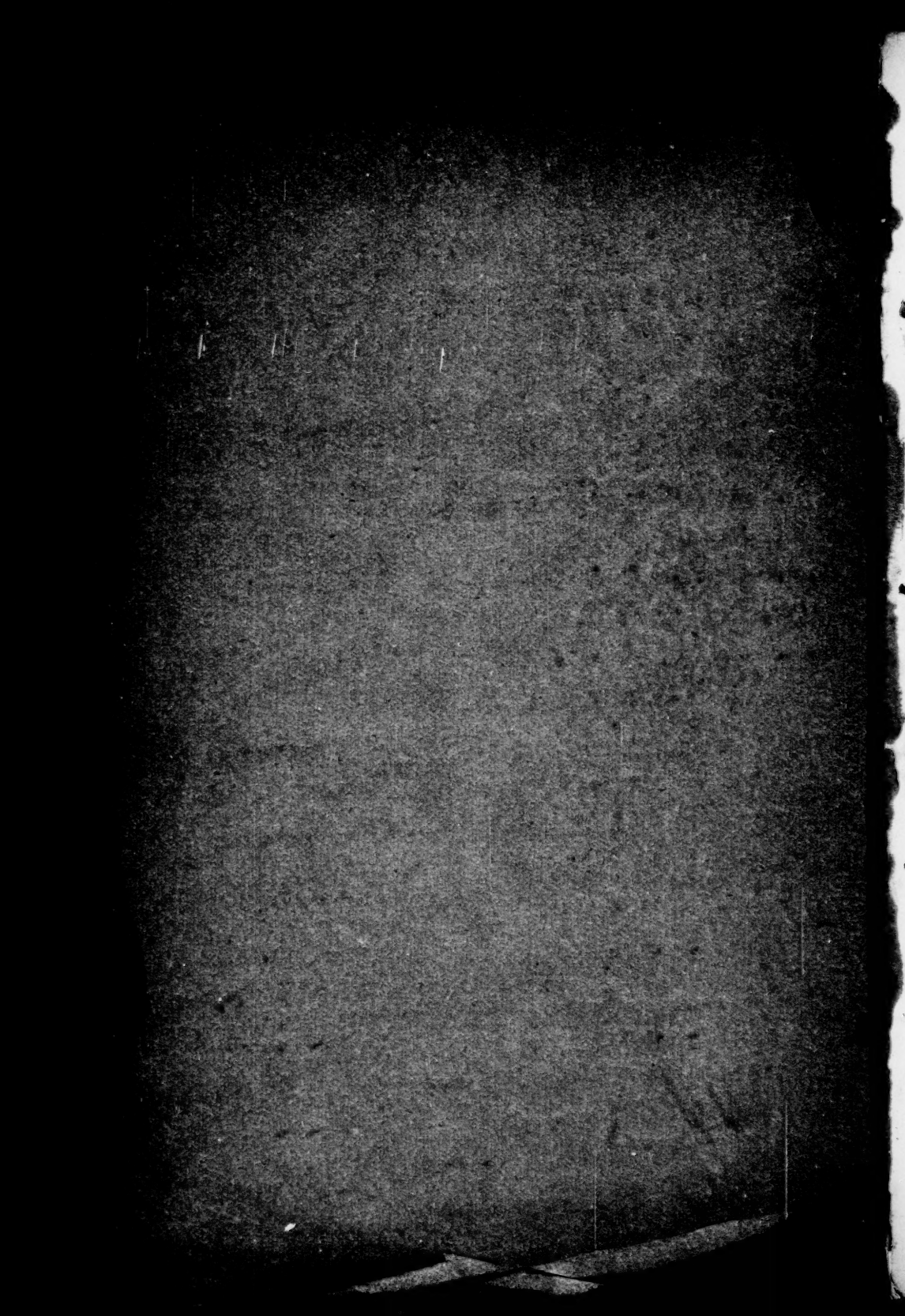
THE ESTATE AND SUCCESSION OF MYRA CLARK GAINES.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Appellant's Brief.

J. R. BECKWITH,
Counsel for Appellant.

A W Hyatt, Print', 73 Camp St. N O—39278



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 15.

THE CITY OF NEW ORLEANS, APPELLANT,

versus

THE REPRESENTATIVES OF THE SUCCESSION OF MYRA CLARK GAINES, APPELLEE.

IN EQUITY.

Appeal from Circuit Court of the United States, Eastern District of Louisiana.

APPELLANT'S BRIEF.

ASSIGNMENT OF ERRORS.

1.

The court erred in entertaining the cause, the pleadings and facts disclosing no equity jurisdiction of the supposed controversy.

2.

The court erred in not sustaining the demurrer to the bill.

3.

The court erred in not dismissing the bill on final hearing for want of equity and failure of proof to sustain the averments of the bill as pleaded.

4.

The court erred in sending the cause to a master for accounting, and compelling the defendants to account before the master before final decree on the merits and before issue, proofs or hearing on merits.

5.

The court erred in not holding and decreeing that all of the matters set up and complained of in the bill of complaint, if of equitable cognizance, were not finally adjudicated upon and settled and *res adjudicata* in the former bill against the City of New Orleans, set forth in the bill and proof as the case of Myra Clark

Gaines vs. the City of New Orleans, No. 2695 of the docket of the Circuit Court of the United States for the district of Louisiana, and in not dismissing the bill for that reason.

6.

The court erred in not sustaining and giving effect to the defendants' plea of *res judicata*.

7.

The court erred in holding and decreeing that equity will entertain a bill for an account of supposed rents and profits, which might, with proper care and diligence in the opinion of the court, have been earned or been received by third persons in tortious possession of realty in bad faith possession, against a defendant who was not in possession of the realty, but against whom the realty was held in adverse possession of third persons during the whole term covered by the account and decree.

8.

The court erred in holding and decreeing that there being no relation of trust, express or implied, between the complainant and defendant, the defendant could lawfully be held and decreed to account for supposed rents, profits and revenues accruing to strangers in actual possession of realty, holding such possession with knowledge that the property was the property of the complainant, the defendant called upon to account being out of possession of the realty and not holding it adverse to the complainant during any of the period covered by the account and decree thereon.

The court erred in finding as a fact that the City of New Orleans by any unlawful or tortious means hindered or delayed the complainant in obtaining possession of the estate of her alleged father, Daniel Clark, but on the other hand should have found that if the complainant has encountered any extraordinary delay in obtaining possession from those holding adverse both to her and the City of New Orleans, such delay was and is the fault of the complainant.

10.

The court erred in holding and decreeing that the City of New Orleans was or could be held in law or equity liable for, or be decreed to pay, and that the complainant, Myra Clark Gaines, could have and recover judgment against the City of New Orleans a sum equal the aggregate total of all decrees rendered against all of the defendants in the ejectment bills of "Myra Clark Gaines vs. P. H. Monsseaux et al., numbered 3663, and Myra C. Gaines vs. P. F. Aguelly, numbered 6085 of the docket of this court," and thirty-four thousand dollars, alleged costs in those cases. The decrees for damages and costs in those cases being decrees against strangers and persons not parties to this record, and against whom the City of New Orleans is decreed no recourse or indemnity in the event of the payment of the decrees against such stranger defendants.

11.

The court erred in mistaking a bill against a municipal corporation as sole defendant unable to answer the bill under oath, or a bill in which an answer under oath is waived in the bill for a bill of discovery.

12.

The court erred in entertaining the bill after the report of the master disclosed the fact that the relief demanded was not equitable relief.

13.

The court erred in rendering any decree on the report of Sobourin, the master, but should have dismissed the bill on the report of the master as a cause of which it had obtained no jurisdiction in equity.

14.

The court erred in entertaining the exception to the report of the master, made by the complainant and in not sustaining the exceptions of the defendant to the master's report.

15.

The court erred in entertaining the exceptions of the complainant to the master's report, not made before the master, the same as if there had been exception to the report before the master before it came into court, and in giving effect thereto by advancing the sum or value of the property for the purpose of estimating damages against defendant from seventy per cent. of the prices

at which the city sold the property in 1837, or when the city parted with possession, to one hundred per cent., or the full price of adjudication in 1837, and in advancing the estimate of the master 30 per centum, and in decreeing against the City of New Orleans for such advanced sum, and the further sum of $34,000, alleged costs, alleged to have been taxed against the defendants in the ejectment suits of Monsseaux and Agnelly, when in fact and in justice the court should have dismissed the complainant's bill of complaint.

16.

The court erred in not sustaining and giving effect to the defense of prescription, as raised by the demurrer and formally pleaded in the answer.

17.

The court was *ratione materiæ* without jurisdiction to make any order or decree in the case, other than a decree dismissing the bill and for costs against the complainant.

[35 La. Ann., 779.]

Succession of Fanny V. Gillaspie.

Wm. M. Gillaspie, Adm'r,
v.
The Citizens' Bank of Louisiana. } Nos. 8575 and 8608.

An action for rents and revenues of immovable property against an evicted possessor is barred by the prescription of one year, if the party evicted shows that he was a possessor in good faith.

Such an action can be maintained against the possessor only, and for the time of his occupancy.

It ceases against the first possessor from the time of his transfer to another party.

Appeal from the civil district court for the parish of Orleans. Tissot, J.

Egan & McEnery for plaintiff and appellee.

Armand Pitot for defendant and appellant.

The opinion of the court was delivered by Poché, J.

Under a foreclosure of mortgage instituted by the Citizens' Bank, a plantation owned by Harrison Jordan, William T. Jordan, and Fanny V. Gillaspie was adjudicated to the Bank in February, 1872, and in May, 1875, the same plantation was sold by the Bank to Mrs. E. F. Jordon, wife of William T. Jordan.

In August, 1876, W. M. Gillaspie, as guardian of the minor children of Fanny V. Gillaspie, instituted a suit for the nullity of the sale of February, 1872, and by judgment of this court rendered in July, 1878, said sale was annulled and set aside, on the ground that in the executory process of the Bank two of the joint owners of the property seized had not been made parties to the suit. (30 An., 1315).

The present controversy presents the claim of the minor heirs of Mrs. Gillaspie against the Bank for one-third of

the fruits and rents of the plantation from the 2d February, 1872, to the 5th of August, 1880, when the plantation was finally sold under a new suit brought by the Citizens' Bank against its original debtors. (32 An., 767).

For defense the Bank denied its liability for such rent, and pleaded in compensation the sum of $6,500 due by Mrs. Gillaspie as the unpaid balance of her stock and loan mortgage, and the Bank also pleaded said sum in reconvention.

Separate judgments were rendered by the district court, one of which overruled the plea in reconvention; the other overruled the plea of compensation, and allowed plaintiff's demand in the sum of $8,500 and legal interest.

Defendant has appealed from both judgments, and by consent the two appeals have been consolidated and are to be tried together.

On appeal the Bank pleads the prescription of one, three, and ten years. That plea must be the first subject of our investigation. The prescription of three years has no application to the nature of the demand. As the present suit was filed on July 16, 1881, and the possession of the Bank commenced in February, 1872, the prescription of ten years is equally unavailing. But the plea of prescription of one year is well taken and must be sustained.

In the case of Gillaspie *v.* Citizens' Bank (30 An., 1315) a demand had been made by plaintiff for the fruits and rent of the plantation, and was rejected on the ground that such demand could not be made by the heirs, but the decree specially recognized the right of such demand in the succession of Mrs. Fanny V. Gillaspie against "the Citizens' Bank, and William T. Jordan, and Mrs. Elizabeth F. Hamson, wife of William T. Jordan," during their respective occupancy of the same.

This court reserved the same right to the succession, in

the decree rendered in the injunction suit, reported in 32 An., 767.

The right reserved was purposely restricted to be exercised against the possessor, and it thus was made to conform with the familiar rule of our jurisprudence. The possessor alone can be held liable to account for rents and revenues.

Now, as the record shows that under its sale to Mrs. Jordan the Bank ceased to be the possessor of the property on the 5th of May, 1875, it follows that it could owe no rent after that time. Hence the right to demand rent and revenue by the plaintiffs against the Bank must be restricted, both according to law and to the decrees of this court, to the time intervening between the 2d of February, 1872, and the 5th of May, 1875.

The next inquiry must be directed to the source or cause of action, with a view to ascertain whether it arises *ex contractu* or *ex delicto*.

A mere inspection of the record, and of the foregoing statement of facts, shows at once that the pleadings do not even purport to disclose or to declare upon a contract; nor can it be demonstrated that the cause of action can be connected with a *quasi contract*.

If liable at all for rent, the Bank is responsible, because it illegally dispossessed the plaintiff, and because it held the property under an illegal or void title. This is an action in the nature of a demand of damages caused to the real owner by and through an unlawful proceeding, resulting in an illegal expropriation and an unwarranted possession.

Hence the act of the Bank complained of, and made the basis of plaintiff's demand, is manifestly a *quasi offense*.

His right of action is therefore amenable to the provisions of Article 3536 of our Civil Code, which bars an

action for a *quasi offense* by the prescription of one year.

This feature of the case is almost identical with the principles involved in the case of DeLizardi *v.* The N. O. Canal Bank, 25 An., 414; see also 9 An., 490, Anty *v.* Adle, and authorities therein cited.

In the case of City of New Orleans *v.* Southern Bank this court said on good authority: "The distinction between damages *ex delicto* and *ex contractu* is that the latter ensue from the breach of a special obligation and the former from the violation of a general duty."

It is clear that the plaintiff in this case can invoke no breach of a special obligation towards his wife by the Bank.

The record shows that the Bank acquired the property and its possession by virtue of an act sufficient in terms to transfer property, and that the defects of its title were not made known to it before the institution of the suit in nullity on the 15th of August, 1876, and that at that time the Bank had parted with the title and with the possession of the property which it had sold to Mrs. Jordan in May of the previous year.

It therefore follows that during the whole time of its possession the Bank was a possessor in good faith. (C. C., Arts. 503, 3452).

Hence it cannot be amenable to the ruling in the case of Walling *v.* Merafield (33 An., 1178), where it was held that the possessor in *bad faith* cannot be shielded by the prescription of three years from an action for rent and revenues of property from which he is evicted.

The judgments appealed from are therefore reversed, and it is now ordered that the plea of prescription of one year be sustained as a bar to plaintiff's action, which is rejected at his costs in both courts.

Rehearing refused.

COMPILATION AND DIGEST OF AUTHORITIES CITED.

There is no equity jurisdiction to compel a unilateral account when there are no offsets or items to be charged, discharged or surcharged, nor to compute damages for alleged torts.

Hipp vs. Babin, 19 *How.* 271.
Towle vs. Laurason, 7 *Pet.* 495.
Root vs. Railroad Company, 105 *U. S.* 189.
Ellis vs. Davis, 109 *U. S.* 485.
Gaines vs. Miller, 111 *U. S.* 395.
Von Weel vs. Wooston, 115 *U. S.* 228.
Buzard vs. Houston, 119 *U. S* 347.
Parkersburg vs. Brown, 106 *U. S.* 487-500.
Ambler vs. Choteau, 107 *U. S.* 586.
Litchfield vs. Ballou, 114 *U. S.* 190.

In such case the defendant has a constitutional right to a trial by jury.

Hipp vs. Babin, 19 *How.* 271-278.
Insurance Co. vs. Bailey, 13 *Wall.* 616-621.
Grand Chute vs. Winegar, 15 *Wall.* 373-375.
Lewis vs. Cocks, 23 *Wall.* 466-470.
Root vs. Railway Co., 105 *U. S.* 189-212.
Killan vs. Ebbinghaus, 110 *U. S.* 568, 573.
New York Guarantee Co. vs. Memphis Water Co., 107 *U. S.* 205, 207.
Francis vs. Flinn, 118 *U. S.* 385.
Buzard vs. Houston, 119 *U. S.* 347.
United States vs. Wilson, 118 U. S. 86-89.
Fussell vs. Gregg, 113 *U. S.* 550.

Equity will not deal with an account simply because it is complicated; to sustain a bill for an account there must be mutual demands. Not a single matter but a series of transactions on one side and payments on the other.

Porter vs. Spencer, 2 *Johns. Ch.* 179.
Badger vs. McNamara, 123 *Mass.* 117.
Walker vs. Brooks, 125 *Mass.* 941.
Ball vs. Carew, 13 *Pick.* 28.
Story, Eq. Jur., ¶ 458, 495.
Dinwiddie vs. Bailey, 6 *Ves.* 141.
Cooper vs. Hatton, 12 *Price*, 502.
Bailey vs. Taylor, 1 *Russ. & M.* 73.
Ambrose vs. Dunow, 9 *Beat.* 508.
Padwick vs. Stanley, 9 *Hare*, 627; 16 *Jur.* 586.
King vs. Barrett, 2 *Y. & J.* 33.
Hemings vs. Pugh, 4 *Giff.* 456; 12 *W. R.* 44; 9. *L. T. N. S.* 292.
Barry vs. Stephens, 31 *L. J. Ch.* 785.
Smith vs. Leveaux, 12 *W. R.* 31; 9. *L. T. N. S.* 13.
Holmes vs. Eastern Counties R. R. Co., 3 *Kay & J.* 675.
IN RE *Aberysmith R. R. Co.*, 7 *Jur. N. S.* 510, 564; 30 *L. J. Ch.* 647; 4 *L. T. N. S.* 537.
Darthey vs. Clements, 6 *Beat.* 165.
Mahoney vs. Dickson, 2 *Sch. & Lef.* 400.
Foley vs. Hill, 1 *Ph.* 399; 16 *Jur.* 586.
Frietas vs. De Santos, 1 *Y. & L.* 574.
Grafton vs. Reed, 26 *W. Va.* 437.
Linn vs. Gunn, 56 *Mich.* 447.

Where there is an effort to give equity jurisdiction by a charge that accounts are intricate and can only be taken in a court of equity, unless the bill shows circumstances and facts showing the intricacy of the account, the bill will be dismissed.

Bowles vs. Orr, 1 *Y. & Cole*, 464.
Padwick vs. Hurst, 18 *Beat.* 575 *and* 18 *Jur.* 763.

Norris vs. Day, 4 *Y. & Cole Ex. Eq.* 475; 10 *L. J. N. S.* 43.
Jones vs. Mannd, 3 *Y. & Cole*, 347.
Phillips vs. Phillips, 9 *Hare*, 471.
Glenie vs. Imri, 3 *Y. & Cole*, 432.
Welchman vs. Farebrother, 1 *Jur. N. S.* 126.
Fluker vs. Taylor, 3 *Drew*, 183.
Ranger vs. Great Western R. R. Co., 5 *H. L. Ca.* 72.
Blythe vs. Whiffin 27 *L. T. N. S.* 330.

A bill in equity cannot be maintained for discovery if it cannot be maintained for relief, unless the bill shows the discovery to be in aid of a suit at law or the defense of a suit at law, actually pending or about to be brought and the action or defense not frivolous.

1 *Story Eq. Jur. Ed.* 1879, ¶ 71-72.
Brown vs. Swan, 10 *Pet.* 497.

(In this case the doctrine is elaborately considered.)

Mitchell vs. Green, 10 *Met.* 101.
Story Eq. Pl. ¶ 312, 545.
Pease vs. Pease, 10 *Met.* 395.
Pool vs. Loyd, 5 *Met.* 525.
Ahernd vs. Adierne, 118 *Mass.* 261.
Walker vs. Brooks, 125 *Mass.* 241.
Haskins vs. Barr, 106 *Mass.* 48.
2 *Story Eq. Jur.* ¶ 1495.
Milf. Eq. Pl. (*Jeremy*), 186.
Cooper's Eq. Pl. Chap. 3, ¶ 3, pp. 191-192.
Dun vs. Coates, 1 *Atk.* 288.
Anon, 2 *Ves.* 451.
Gelston vs. Hoyt, 1 *Johns. Ch.* 547-548.

It is doubtful if a bill of discovery can be maintained, since parties can be examined as witnesses.

Heath vs. Erie R. R. Co., 9 *Blatch.* 316.

A bill against a corporation as sole defendant, or a bill that waives answer under oath, is not a bill for discovery :

Huntington vs. Saunders, 120 *U. S.* 78.
United States vs. Wagner, *Law Rep.* 2 *Ch.* 582.
Republic of Liberia vs. Roye, 15 *Eng. Rep.* (*Moak*), 44; *1st Appeal Cases*, 189.
Republic of Costa Rica vs. Erlinger, 15 *Eng. Rep.* (*Moak*), 690; *Law Rep.* 1 *Chanc. Div.* 171.
Republic of Peru vs. Weguelin, *L. R.* 20 *Eq. Cases*, 140 ; 13 *Eng. Rep.* (*Moak*), 679.

Res judicata bears upon parties and all those in privity, and is not only conclusive as to all matters that have been drawn into the controversy between them in a former judicial controversy, but also conclusive as to all matters that might have been litigated in the prior litigation :

Packet Company vs. Sickles, 6 *Wall.* 592.
Hopkins vs. Lee, 6 *Wheat.* 109.
U. S. Bank vs. Beverly, 1 *How.* 134.
Chapman vs. Smith, 16 *How.* 114.
Thompson vs. Roberts, 24 *How.* 233.
Campbell vs. Rankin, 99 *U. S.* 261.
Baird vs. United States, 96 *U. S.* 430.
Ancora vs. West, 7 *Wall.* 82.
The Apollon, 9 *Wheat.* 362.
Durant vs. Essex Co., 7 *Wall.* 107.
Nashville R. R. Co. vs United States, 113 *U. S.* 261.
Hebburn vs. Dunlap, 1 *Wheat.* 179.
Ballance vs. Forsyth, 24 *How.* 183.
Beloit vs. Morgan, 7 *Wall.* 619.
Gould vs. Railway Co., 91 *U. S.* 526.
Tioga R. R. Co. vs. R. R. Co., 20 *Wall.* 137.
Montgomery vs. Samory, 99 *U. S.* 482.
Block vs. County Commissioners, 99 *U. S.* 686.
Louis vs. Brown Township, 109 *U. S.* 162.

Pollard vs. R. R. Co., 101 *U. S.* 223.
Lumber Company vs. Butchtel, 101 *U. S.* 638.
Case vs. Beauregard, 101 *U. S.* 688
Stout vs. Lye, 103 *U. S.* 66.
Whiteside vs. Hazelton, 110 *U. S.* 296.
Corcoran Canal Co., 94 *U. S.* 741.
Cromwell vs. County of Sac, 94 *U. S.* 351.
Bryan vs. Kennett, 113 *U. S.* 179.
United States vs. Parker, 120 *U. S.* 89
Coffee vs. United States, 116 *U. S.* 436.
United States vs. McKee, 4 *Dillon*, 128.
Merrit vs. Campbell, 47 *Cal.* 542.

This is the established jurisprudence in all of the states:

Cunningham vs. Ashley, 45 *Cal.* 485.
Jackson vs. Lodge, 36 *Cal.* 28.
Warren vs. Cummings, 6 *Cush.* 103.
Simpson vs. Hart, 1 *Johns. Ch.* 91.
Kingland vs. Spalding, 3 *Barb. Ch.* 341.
Gardiner vs. Buckbee, 3 *Cow.* 120.
Burt vs. Sternberg, 4 *Cow.* 559.
Ethridge vs. Osborn, 12 *Wend.* 399.
Einbury vs. Connor, 3 *Coms.* 511.
Doty vs. Brown, 4 *Coms.* 71.
Castle vs. Noyes, 4 *Kern.* 329.
Gelson vs. Hoyt, 1 *Johns. Ch.* 543.
Hoyt vs. Gelson, 13 *Johns. Ch.* 141.
Holmes vs. Remsen, 7 *Johns. Ch.* 286.
Egleston vs. Knickerbocker, 6 *Barb.* 458.
Orgsby vs. LaFarge, 2 *Coms.* 112.
Darone vs. Fanning, 4 *Johns. Ch.* 199.
Newcomb vs. St. Peter's Church, 2 *Sands. Ch.* 636.
O'Brien vs. Heeny, 2 *Ewd.* 461.
Lansing vs. Russell, 13 *Barb.* 510.
Burhans vs. VanZandt, 3 *Seld.* 523.

Bellinger vs. Croigne, 31 *Barb.* 534.
People vs. Supervisors, 27 *Cal.* 675.
Stewart vs. Stebbins, 30 *Miss.* 81.
Baker vs. Cleveland, 19 *Mich.* 235.
Hooker vs. Hubbard, 102 Mass. 242.
White vs. Simonds, 33 *Vt.* 180.
Day vs. Valette, 25 *Ind.* 43.
Herman on Estoppel and Res Judicata. Ed. 1886, *vol.* 1, ¶ 121, *and cases cited in note* 3.

"Art. 156. If one demand less than is due him and do not "amend his petition in order to augment his demand, he shall "lose the overplus." La. C. P. 156.

McCaleb vs. Estate of Fluker, 14 *Ann.* 316.
Brandagee vs. Chamberlain, 2 *Rob.* 207.
Pascoen's Widow vs. Pavia 14 *La.* 135.

The rule stated in Art. 156, C. P., is the same at common law and in equity :

Rockwell vs. Langley, 19 *Pa. St.* 508.
Smith vs. Weeks, 26 *Barb.* 468.
Fulton vs. Matthews, 15 *Johns.* 432.
Jackson vs. Colver, 16 *Johns.* 487.
Beckford vs. Cooper, 41 *Pa. St.* 446.
Logan vs. Caffrey, 30 *Pa. St.* 196.
Weckensham vs. Wheedon, 33 *Mo.* 561.
Bancroft vs. Winspear, 44 *Barb.* 209.
Guernsey vs. Carser, 8 *Wend.* 492.
Stein vs. Steamboat, 17 *Ohio St.* 471.
Mandeville vs. Welsh, 5 *Wheat.* 277.
Barksdale vs. Green, 29 *Ga.* 420.
Ewing vs. McNairy, 20 *Pa. St.* 321.
Walker vs. Ames, 2 *Cow.* 428.
Rogers vs. Higgins, 57 Ill. 247.
Stockton vs. Ford, 18 *How.* (*U. S.*) 420.
Art. 2452, *La. Civil Code* (2427 *old Code*).

"The sale of a thing belonging to another person is null. It may give rise to an action for damages in case of eviction when the buyer knew not that the thing belonged to another person," as construed by the Supreme Court of Louisiana, refuses damages in case of eviction where the buyer knew the thing did not belong to the vendor:

Jeanin vs. Millaudon, 5 *Rob.* 76.
Hall vs. Neville, 3 *Ann.* 326.
Scott vs Featherstone, 5 *Ann.* 306.
Civil Code, *Art.* 1965.
Nast vs. Johnston, 9 *Rob.* 8.

Daniel Clark's will of 1811, after its probate, was a muniment of title warranting possession by the occupants of the Blanc tract until it was set aside by the probate of the alleged will of 1813:

Davis vs. Gaines, 104 *U. S.* 386.
Allen vs. Dundas, 3 *T. R.* 125.
Rex vs. Vincent, 1 *Stra.* 481.
Woolley vs. Clark, 5 *Barn. & Ald.* 746.
Williams on Executors, 6 *Amer. Ed.* 590 (*note X*).
Packman's Case, 6 *Co.* 19.
Semene vs. Semene, 1 *Lev.* 90.
Graysbrook vs. Fox, *Pl. Com.* 282.
Thompson vs. Harding, 2 *El. & Bl.* 630.
Parker vs. Kett, 1 *Ld. Raym.* 658.
Waters vs. Stickney, 12 *Allen*, 15.
Peebles' Appeal, 5 *Serg. & R.* 39.
Kittredge vs. Folsom, 8 *N. H.* 98.
Stone vs. Peasley's Estate, 28 *Vt.* 716.
Steele vs. Renn, 50 *Tex.* 467.

A warrantor, who is not in possession, in the event of recovery on the covenant of warranty, only owes interest from

judicial demand if the amount is liquidated or from judgment if the amount is unliquidated.

Melancon's Heirs vs. Robichaud's Heirs, 19 *La.* 357.
Daquin vs. Coiron, 3 *La.* 387, 395.
Conoley vs. Bertrand, 12 *La.* 313.
Herman vs. Sprigg, Martin's R. 3 *U. S.* 190.
Bournigan vs. Destrehin, 5 *La.* 115.

The warrantee has no right of action against the warrantor until the warrantee is *actually put out of possession.* The return of a writ of possession to which the warrantor is not a party is not adequate proof of actual eviction in a suit on the covenant of warranty.

Hale vs. New Orleans, 13 *Ann:* 499.
Melancon's Heirs vs. Duhamel, 7 *La.* 286.
Fletcher's Heirs vs. Cavillier, 10 *La.* 120.
Laborde vs. New Orleans, 13 *Ann.* 326.

The owner of realty, after eviction of adverse holder, has no action against the vendor of the evicted for rents and profits.

Gillaspie vs. Citizens' Bank, 35 *Ann.* 779.

(Civil Code of Louisiana.)

ART. 3536. [3501.]—The following actions are also prescribed by one year:

That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offences or quasi offences.

That which a possessor may institute, to have himself maintained or restored to his possession, when he has been disturbed or evicted.

That for the delivery of merchandise or other effects, shipped on board any kind of vessels.

That for damage sustained by merchandise on board ships, or which may have happened by ships running foul of each other.

C. C. 2315 (2294); C. P. 49, § 4, 53, 59; 2 N. S. 24; 3 N. S. 585; 3 L. 274, 340; 6 R. 382; 10 R. 117; 2 A. 400; 12 A. 346; 13 A. 126, 609; 14 A. 117, 390, 511; 15 A. 298, 418; 16 A. 140, 215, 338, 354; 19 A. 491; 20 A. 151, 169, 214, 323; 21 A. 493; 23 A. 162, 299; D. Sec. 3546.

ART. 3538. [3503.]—The following actions are prescribed by three years:

That for arrearages of rent charge, annuities and alimony, or of the hire of movables and immovables.

That for the payment of money lent.

That for the salaries of overseers, clerks, secretaries, and of teachers of the sciences, who give lessons by the year or quarter.

That of physicians, surgeons and apothecaries, for visits, operations and medicines.

That of parish recorders, sheriffs, clerks and attorneys, for their fees and emoluments.

That on the accounts of merchants, whether selling for wholesale or retail.

That on the accounts of retailers of provisions, and that of retailers of liquors who do not sell ardent spirits in less quantities than a quart.

That on all other open accounts.

This prescription only ceases from the time there has been an account acknowledged, a note or bond given, or an action commenced.

(Am'd.) C. C. 1068 (1061), 1188 (1176), 1431 (1380), 2348 (2328), 2788 (2759), 3476 (3440), 3506 (3472), 3534 (3499), 3544 (3508); 2 N. S. 515; 6 N. S. 248; 8 N. S. 492; 2 L. 382; 4 L. 14; 6 L. 359; 14 L. 553; 6 R. 450; 11 R. 139; 1 A. 209; 2 A. 876; 3 A. 458; 5 A. 603; 6 A. 759; 9 A. 484; 11 A. 462; 12 A. 401, 672, 673, 840; 14 A. 275, 705; 15 A. 135, 143, 528, 580, 639; 19 A. 453; 20 A. 119, 156; 21 A. 293; 24 A. 73, 271; D. Sec. 5, 453, 2811. Acts 1850, p. 90.

ART. 3544. [3508.]—In general, all personal actions, except those before enumerated, are prescribed by ten years.

(Am'd.) C. C. 1413 (1451), 1876 (1870), 2568 (2546), 2588 (2566) 3474 (3437), 3538 (3503); 6 L. 674; 11 L. 148, 563; 7 R. 387; 12 R. 141, 148, 402; 2 A. 405, 634, 779; 3 A. 46, 177, 220, 323; 4 A. 169, 171; 6 A. 481; 10 A. 253, 320, 583; 11 A. 296, 472, 654; 12 A. 357, 728, 878; 13 A. 124, 294, 514; 14 A. 159, 205, 230, 301, 653, 657, 663, 704, 740, 742, 816, 970; 15 A. 49, 150, 469, 534, 639; 16 A. 352; 17 A. 246, 248; 19 A. 174, 325, 491; 20 A. 116, 169, 403; 21 A. 697, 701; 22 A. 143, 152; 23 A. 355; 24 A. 200, 565; D. Sec. 455. Acts 1852, p. 90, § 2. Acts 1853, p. 250.

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ATEMENT AND HISTORY OF THE CASE AND ITS RELATION TO THE FORMER LITIGATION BY MYRA CLARK GAINES, CONCERNING THE ESTATE OF DANIEL CLARK.

While in strange contrast with the result of the suit, the tement of facts reported with the case, *New Orleans vs. Gaines*, *Wall. 624*, is a fair general outline of the controversy which one form or another was carried on by the now deceased liti- us Myra Clark Gaines for half a century, commencing from the ment she alleged herself to have first discovered that her exist- ce might be owing to the liasion between Daniel Clark and *ime Carriere*, *Madam Des Granges*, *Madam Clark* or *Madam rdette*, by whatever name this much married lascivious produc- n of a then not over moral frontier town may be called. and end- only so far as she was concerned, when in the course of nature dust was mingled with that of her *res adjudicata* parent on the ernal side of her *res adjudicata* pedigree.

At the termination of the extraordinary majority opinion in case of *Gaines vs. Hennen*, 24 How., remarkable not only for the aper of the language used but for its contrast in conclusion of h law and fact with a former solemn adjudication of the Court on substantially the same evidence and case in so far as it related he *status* and inheriting capacity of the same complainant. Jus- Wayne stated: "When hereafter some distinguished American yer shall retire from his practice to write the history of his ntry's jurisprudence, this cause will be registered by him as most remarkable in the records of its courts."

That it is remarkable is beyond doubt; that any such writer, patriotic, would register the case at all, is more doubtful.

The results in the various suits have been too conflicting to il much pride. He would be more likely to concur with Jus- Grier, dissenting from the bare majority, "Both as to the law

"and the facts, but I do not think it necessary to vindicate my "opinion by again presenting to the public now a history of the "scandalous gossip which has been buried under the dust of half "a century, and which a proper feeling of delicacy would have "suffered to remain so. I therefore dismiss this case as I hope "for the last time, with the single remark, that if it be the law "of Louisiana, that a will can be established by the dim recollec- "tions, imaginations or inventions of anile gossips after forty-five "years to disturb the titles and possessions of *bona fide* purchasers "without notice, of an apparently indefeasible legal title. *Haud* "*equidem invideo miror magis.*" If stating the truth, would, if referring to the case, state it as an instance of a [redacted] case where all of the contemporaries of the pretended father and mother, and of the circumstances surrounding the birth of the complainant, never would accept the finding of facts save as an absolute reversal of truth and fact.

There never existed on this earth of persons competent to form an intelligent opinion of the truth and fact, one hundred who believe that there is any proof that Daniel Clark was the father of the complainant in these cases, that Zulime Carriere, though much given to marriage, was ever the wife of Clark, or could muster him with her battalion of husbands, when she called a dress parade of her marital ranks, or that any human tribunal can ever determine whether the complainant was conceived in the ranks of her husbands, or in one of her habitual excursions outside of the regularly enlisted corps.

But whatever of doubt and protest there may be, and however much terror of equity the litigation in this case may have instilled in the minds of an entire community, under the rule of *res adjudicata*, based upon public policy, the controversy as to the *status* and inheriting capacity of Myra Clark Gaines, so far as this defendant is concerned, was closed, if not by the Hennen case, at least by the case of *Gaines vs. New Orleans, 6 Wall. 612*, although the complainant with some reason believed that no judicial proceeding against her, whatever the result or range and form of the decree, could be *res judicata* as to her.

It may be taken as true, as far as the City of New Orleans is concerned, that it is judicially settled—

First: That Myra Clark Gaines had Zulime Carriere for a mother confirmed by the reluctant confession of Zulime, after more than a quarter of a century of concealment of that fact from her own abandoned progeny.

Second: That the courts have given her a *res adjudicata* father, whoever the real person may have been; that the Courts have settled the paternity on the late Daniel Clark.

Third: That whatever may have been the real relation between Zulime Carriere and her several co-existing husbands, the courts have made a *res adjudicata* valid marriage between Zulime and Daniel Clark, and so timed the marriage as to make the conception and birth of Myra fall between the date of marriage with Clark, and her chronic abandonment of Clark as one of her husbands, and marrying a new recruit, *Gardette;* that Clark was of complacent temper or philosophical turn of mind, and saw his wife abandon him and enlist Gardette as husband without a murmur. The act was probably not unexpected. Clark had seen her do the same thing before, as the French phrase it, it was her system.

Fourth: That Myra is endowed with permanent *res adjudicata* legitimacy, however much of adultery there may have been in her procreation; that this class of legitimacy is good enough for purposes of inheritance either as heir at law or legatee of her *res adjudicata* father.

Fifth: That although Relf and Chew lived a long life in the City of New Orleans and died respected, and an entire community still respects their memory, one or both of them were rogues and criminals, and spoliated the pretended will of 1813.

Sixth: That the garrulous old women used as witnesses retained for forty-five years fresh in their memories the text and a mental photograph of the chirography of a will of 1813, and with infallibility reproduced the text and verified the handwriting of both body and signature of a will of which they had but one short vision or perusal, even though they were unable to locate the number or exact locality of the house, in which they resided at the time.

Seventh: That Myra Clark Gaines was named as universal legatee in this embalmed and resurrected will, and had capacity to stand as universal legatee in virtue of her adjudicated legitimacy; that if she had not been given legitimacy by the fact that out of the many husbands of Zulime Carriere, the courts have elected Clark to the doubtful honor of being the *lawful* husband, she still had capacity to inherit, because Zulime fooled Clark into the belief that there was no bigamy or adultery on her side; that Clark had overcome the suspicion of infidelity to a former living husband necessarily involved in keeping Des Granges in Bordeaux, and sending Zulime in Philadelphia to be clandestinely confined of the admitted bastard, afterwards known as Caroline Barnes, and took Zulime to himself as a wife without suspicion of former and living husband, and therefore if Myra was in fact an adulterine bastard, she could still inherit as universal legatee of Clark, because Clark had been fooled to the top of his bent by her mother.

Eighth: That although most of the estate of Clark was disposed of to pay his debts, yet in so far as the property that went into the possession of Mary Clark, the mother of the testator, his universal legatee under the will of 1811, and was held by her under that title, all sales and dispositions of the property by her are null and void, made in fraud, of which the whole world must take notice and at all times knew.

Ninth: that a duly probated will, with a duly named universal legatee in possession and a deed of conveyance from the universal legatee, do not together constitute muniment of legal title in a purchaser in good faith to such extent that the title and presumption of good faith do not disappear when nearly a half century afterwards, people can be found reckless enough to swear into existence a subsequent will. That in such case what was legal title and good faith becomes waste paper as to deeds of conveyance, and tortious inexcusable trespass as to possession under color of the former probate and apparently apparent honest conveyance.

Tenth: That all of the world, including the very judge who presided in the probate court "ought to have known, and *did*

know," that the will of 1811 was null and its probate a deliberate fraud, and that the record of the probate of that will was not *voidable* only, but *absolutely void.*

With this volume of matter *res adjudicata* against the defendant in this bill, it is not permitted to re-try these issues again in this court in this cause: it is therefore only necessary to state sufficient of former litigation to show upon what the present bill and decree is based, whether in all of this controversy there has been unilateral *res judicata*, and the complainant in the bill not concluded in any respect by any of the decrees of the courts, and in the former litigation. In the present controversy this is involved both as a question of fact and law.

In so far as it is necessary to deal with the former litigation in the determination of this cause, the facts as shown by the records of former suits, all here, in transcript, are as follows:

In the early litigation Myra Clark Gaines averring that she did not know the exact date of her birth, fixed the date so that she became of full age in 1826; afterwards, when it became expedient to avoid prescription, she changed her birth day so as make her a major in 1827; she was probably born earlier, but for purposes of this cause it is assumed that she was born either in the year 1805 or in 1806. She was separated from her mother at birth, and drifted to Philadelphia before the death of Clark where she was reared as the child of S. P. Davis, as she avers, ignorant of her origin. In 1808, Zulime Carriere, her mother, since adjudicated to have been at that time the lawful wife of Daniel Clark, went to Philadelphia, and on August 2d, 1808, was, by the rites of the Catholic Church, in due form married to *James Gardette*, a practising dentist residing in that city, and for years lived within a few blocks of the residence of Davis, where Myra, her offspring, was being reared by the bounty of others.

Myra Clark Gaines in her bills, avers that although living in such close proximity, her mother did not make her maternity (which Zulime *Carriere Clark Gardette* certainly knew) known to

her and left her to ascertain that fact from other sources some time in 1832 or 1834, when she was 26 or 27 years of age.

That from 1813, when Clark died, until 1832 or 1834, through the pretence of Davis that she was his child, and the silence of her mother, she had no knowledge or means of knowledge that she could claim any relationship with Daniel Clark, or any interest in his succession. This seems to have been the result of the reticence of her mother and the false pretence of paternity set up by Davis.

Although far above the age of majority, and at the time the wife of W. W. Whitney, a man of means, she took no steps to make her pretence of heirship manifest to those who had purchased the real estate of which Clark died seized, until two years after she first acquired knowledge of her supposed parentage in 1832.

On the 18th of June, 1834, she instituted proceedings in the probate court in New Orleans, charging that a will of subsequent date to the probated will of 1811, made and dated sometime in 1813, had been executed by Clark just previous to his death, and spoliated or suppressed, and prayed for probate of the spoliated will as a lost or destroyed instrument, claiming to be interested in this will as legatee. The cause was pending in the probate court nearly two years, when on or about the 8th of June, 1836, she was non-suited, and turned out of court. Instead of attempting again the probate of the alleged lost will in the probate court, she seems to have abandoned that tribunal, and on, the 28th of July, a month and twenty days after her non-suit in the probate court, filed a bill in the District Court of the United States at New Orleans, then vested with Circuit Court powers. This is the famous suit known as No. 122, W. W. Whitney and Wife vs. Relf, Chew and others, which for years was by collusion or otherwise coming up to this court in detachments (Rec. Vol. 2, 1105). The bill was exhibited against Relf and Chew as executors, under the will of 1811, Elinor O'Bearne and others, including the City of New Orleans and *Charles Patterson*, the colluding defend-

ants, who figured in the case of *Patterson vs. Gaines, 6 How. 550.* The defendants, other than the executors, were alleged to be either heirs at law of Clark or in unlawful possession of the estate of Clark. An account for slaves and other property was demanded of the executors: possession and profits from the other defendants. Amongst the other property sought to be recovered was the "Blanc tract," about which the present bill was filed.

In her original bill she sets up title as the universal legatee of Clark under the alleged spoliated will of 1813, charging that the will of 1813, came into the possession of Richard Relf immediately on the death of Clark in 1813, and that he fraudulently destroyed or suppressed the will and procured the probate of the will of 1811. That she accidentally discovered her legateeship in 1832, prayed for relief that the Court establish and give effect to the pretended will of 1813, declare her legitimate and the sole issue of lawful marriage between Zulime Carriere and Clark, for ejectment and possession of the realty left by Clark, with account of profits, and that the executors come to an account, and that their acts be declared void, and for discovery generally.

Under the law governing practice in the state courts, the defendants, if French was their mother tongue, were entitled to service of papers translated into that tongue. Some of the defendants were of French origin, and claimed that right in equity proceedings. The District Judge held with them, and ordered that all future proceedings in the cause be in form as prescribed by the law for proceedings in state courts. This led to the first appeal to this court, *Exparte Myra Clark Whitney, 13 Pet. 404;* when practically it was ordered that the cause proceed in equity in the prescribed form of equity proceedings.

This delayed the case until 1839. Whitney died: the court allowed the widow to prosecute the suit; she afterwards married General Gaines, and he was made party complainant and the case transferred to the Circuit Court.

The Circuit Court differed, and the Judges were opposed in opinion as to whether chancery prevailed in Louisiana; whether

the orders complained of in *Exparte Whitney, 13 Pet.* should be vacated, and whether the cause should be put on the rule docket to proceed according to the chancery rules, and the defendants be required to answer without *oyer* or copy of bill and papers in French. The matter was again brought to this court on the certificate of division of opinion; and at the January Term, 1841, of the Supreme Court, all of the questions were answered in the affirmative, and certified back to the Circuit Court. *Gaines et al. vs Relf et al. 13 Pet. 9.* The controversy as to the form of proceedings then terminated.

The defendants, most of them, demurred to the bill. On the hearing of the demurrers, the court again divided in opinion, 1st, as to whether the bill was multifarious; 2d, whether the court could entertain jurisdiction of the case without the probate of the will alleged to have been destroyed; 3d, whether the case was one of equity jurisdiction.

The bill had meanwhile been amended, and Caroline Barnes and her husband, the admitted illegitimate child born of Zulime while Des Granges was in Bordeaux. The case was again carried up to this court, *Gaines et ux. vs. Chew et al., 2 How. 619,* and determined at the January Term, 1844. The court holding in substance that the bill could be amended so as not to be multifarious.

That the court could entertain the case on the bill of Mrs. Gaines, as heir at law, without the probate of the alleged spoliated will. That the bill could be held for discovery as to the alleged spoliation of the will. That the case was one of equity jurisdiction. It was 1845 before there was final determination of the demurrers in the Circuit Court.

Yielding to the view of the Supreme Court, after the decision in 2d How., the complainant finding she could not deal with the pretended will of 1813, as a muniment of title, until probated, began a most extraordinary series of alterations in her case and amendments in her bill. In July, 1844, she amended and brought in her sister, Caroline Barnes, who at least was a daughter of the

same mother, and an heir of Clark, and as such claimed part of the estate. This change in the bill was evidently made to illustrate complainant's boast that she was not fighting for money, but to protect the "reputation" of her mother, who had recently donated to her her pretended rights as widow of Clark. In this amendment she returned her mother's liberality, and fortified her reputation by charging her mother with giving birth to an illegitimate child, and illustrated her filial affection by charging that Caroline Barnes, the child of her own parents, was a bastard; averring that she, Caroline, was not legitimate; that she, the complainant, had attempted the probate of the will of 1813, and that there was such prejudice against her, and the Chief Justice of the Supreme Court of the State, and Justice Mathews of that court were interested in property of the succession of Clark, bought of Relf and Chew; that they would defeat her if she attempted the probate again.

That by reason of the great lapse of time, death of witnesses, and the prevailing opinion that the probate court was without jurisdiction to act on a lost or destroyed will, she amended her bill so as to require no account of Relf and Chew, discontinuing her prayer to that end, and proceeded to set up a *new title* to the property, claiming not as universal legatee but *forced heir* at law of Daniel Clark: claiming that the property was acquired during the matrimonial relation between Clark and Zulime, and was community property, one-half of which belonged to her mother, who had conveyed and donated her claim and rights to the complainant. That if she could not set up claim to the entire estate as legatee under the spoliated will, that she claimed four-fifths of the remaining one-half as *forced heir* of Daniel Clark. On November 28th, 1848, the complainant again filed what she termed "An amended and supplemental bill," in which she again charged Relf and Chew with destroying the pretended will of 1813; sets out the difficulty of probate by lapse of time, etc.; states that this will of 1813 contained a statement that she, Myra, was Clark's only legitimate daughter; that she only relied on that will

as proof of her acknowledged legitimacy, and declares that for the purposes of the suit she will not insist upon the will of 1813, for the purpose of availing herself of the devise therein contained in her favor, but claims four-fifths of the estate as the *forced heiress* of Clark. The "Blanc tract" was included in the bill, as amended, and the City of New Orleans made party defendant. It was therefore not until November, 1848, that the complainant completed her pleading in this suit and tendered an issuable bill. This was no fault of the defendants, but was the result of her shifting her claim to title from devise to *forced heirship*.

On the 20th of January, 1849, under cover of a pretended bill of the revivor against the representatives of dead defendants, she set up the collusive proceedings with the defendant *Patterson*, setting out the decree of eviction against Patterson, and the appeal of the case to the Supreme Court; averring that the decree was reversed because it gave her *too much*, the Circuit Court decree gave her the *entire* property while her bill only called for her mother's share and a *forced heir's* share of four-fifths of the balance, and asserted that the collusive enterprise of complainant and Patterson (who was to lose nothing by the decree) had the effect of *res adjudicata* as to *all* of the defendants who did not collude with her but carried on the battle in the Circuit Court. That this decree established her *forced heirship* and inheriting capacity beyond further dispute by the other defendants.

To put herself in this position she had made a collusive agreement with Patterson to save him harmless of recovery, costs, counsel fees and expense of the litigation. The result was that in April, 1840, on a case made up between them, in which the proofs in the non-suited probate proceedings were used, a final decree was entered in the Circuit Court against Patterson for *all* of the property in Patterson's possession. The case was appealed practically by the successful complainant, and determined in the court in *Patterson vs. Gaines, 6 How. 550;* since decreed by this court to have been a fraud on the court. She made the proceedings against Patterson, and the decree and proceedings in the Supreme Court a

part of her bill. The Circuit Court refused to hold the *Patterson* decree binding on the other defendants. A vast volume of testimony was taken, and the bill brought on to final hearing on bill, amendments, and supplemental bills, answers, replication and proofs, and was set for hearing on the 12th day of November, 1849. On motion of complainants hearing was continued until December 17th, but the case was not heard until the 23d of January, 1850, the hearing lasting several days: eminent counsel were heard on behalf of complainant—John A. Campbell, afterwards a Justice of this court, and John R. Grimes, being her leading counsel. Argument was concluded on the 7th of February, 1850, the case taken under advisement, and on the 21st of February 1850, there was final decree dismissing the bill as to all of the defendants, the First Municipality being one of the defendants. From this decree the complainants appealed to this court. The case is reported as *Gaines vs. Relf, 12 How. 472.* This court affirmed the decree of the Circuit Court; held that the decree in Patterson vs. Gaines was not binding on any of the other defendants; that the sisters of Zulime, who swore to the marriage of Clark with Zulime, were not worthy of belief. Found against the plaintiff on the issue of marriage; found Zulime to have been the wife of Des Granges, at the date of the birth of complainant. That complainant was illegitimate, not the lawful heir of Daniel Clark; that her mother *was not the widow of Daniel Clark*, and that the complainant took nothing by the pretended conveyance of Zulime Carriere or Mrs. Des Granges' rights, as widow in community, she not being the widow of Clark.

This decree, which settled the entire controversy as to the "Blanc tract," and all other assets of the succession of Clark, was rendered at the December term of this Court, A. D. 1851, and dismissed the bills and ended litigation in the celebrated case No. 122.

We have been thus minute in the statement of the history and course of this case, because the decree in the present case is ren-

dered as a punishment to the defendant, for obstructing the plaintiff in the recovery of the property left by Clark.

The plaintff, claiming as heir at law of Clark, and assignee of the widow, in December, 1851, had been decreed to have no right or title on the property, or capacity to take as legatee. The decree of this court establishing her an adulterous bastard.

In Louisiana jurisprudence, there is and can be no question that having renounced the pretended will of 1813, and sought to recover as *forced heir*, she could not after defeat set up the renounced will as ground or muniment of title. The title to the estate of Daniel Clark was at rest, and could never have been again disturbed by Myra Clark Gaines or her heirs in the state courts. Those who were unfortunate enough to hold any of the property that had been attacked by Myra Clark Gaines had right to believe the cloud off their title and their title indefeasible.

They had reason to believe that all the complainant could urge had been ably presented. She was represented in the Supreme Court by most able counsel, John A. Campbell, of whose learning, skill and cunning in his profession, they had had marked illustration in the trial in the Circuit Court, and Reverdy Johnson, who at that time possessed a national reputation. The defendants were represented by Daniel Webster and Mr. Duncan. The language of the opinion was calm and judicial in style and temper, the findings conclusive in character, and the decree dismissing this bill *ought* to have been an end of her contention to obtain the estate of Clark, and was believed to be final, and an end to fictitious claim of title and vexatious litigation, in which the complainant had attacked the reputation of respected and respectable men with the ferocity of a tigress, charging them with the commission of nearly the whole calendar of crimes.

The complainant seems to have been advised or to have thought her controversy ended, and made no further move until the 18th of January, 1855, when ignoring her renunciation of the supposed will of 1813, in her abortive attempt to recover in the federal court as forced heir of Clark and assignee of the alleged

widow's community right, she went into the probate court in New Orleans, and setting up the same old story of the spoliation of a will made in 1813, applied for its probate as a lost or destroyed document.

The probate court refused probate; she appealed to the Supreme Court, where, by one of the most extraordinary opinions extant in any reports, that court ordered an olographic will to probate, the text of which was never known or pretended to be established only so far as it would benefit the complainant, though the purport claims be given. This opinion has never been recognized or declaratory of the law in Louisiana, and never will be so accepted. This consummation well merited the rebuke given it by Justice Grier, and was not reached until the 26th of February, 1856. When she had obtained this action, about which there was much scandal at the time, she rushed again into the Federal Circuit Court, and filed another bill, the famous 2695. This bill was filed on the 22d day of December, 1856. Gaines, her husband, was dead, and she filed the bill in her own name. The defendants were the City of New Orleans, H. E. Lamyre, Charles Hopkins, D. Lanata and L. L. Ferriere. The property sought to be recovered included the "Blanc tract," the same property described in her former bill, No. 122. The description of the property was evidently copied from the dismissed bill in No. 122. The bill set out the same old story of her birth, early infancy, concealment of her parentage, the will of 1811, the pretended will of 1813, its alleged spoliation, the story of its probate, that the city pretended to have acquired the "Blanc tract" by title that came to its vendors from Relf and Chew, as agents or attorneys of Mary Clark, legatee under the will of 1811, that this title was vicious: that the city knew it to be vicious at the time of its purchase; that she was entitled to possession and rents, profits, etc., as universal legatee under the will of 1813; that the Supreme Court had decided her not to be heir at law, and now she claimed as legatee under the probate of the will of 1813.

She prayed that the defendants be decreed to deliver up the land and be decreed to have held it as *trustee* of complainant, to make full discovery, account for rents and profits and revenues "*from the time said property was taken possession of by said defendants, with interest thereon,*" general relief, and be required to answer four interrogatories. The interrogatories in question were :

1st. Whether the property in the bill was not part of the estate of Clark?

2d. Whether defendants claimed to be the owners of any of the property ?

3d. Concerning the revenue received, its amount, etc.

4th. Whether the defendants had sold any of the property, and if so how it had been sold ?

Process was served on the City on the 24th of December, 1856.

At about the same date she filed like bills for the recovery of other portions of land alleged to belong to Clark at the date of his death, amongst others a bill against D. N. Hennen, which by collusion with Hennen she managed to get into the Supreme Court in advance of the case against the City of New Orleans, pursuing the same tactics as in the former case.

On the 22d of April, 1857, the City answered, setting up amongst other things the decree of the Supreme Court defining the *status* of the complainant: that this decree was a bar to any further action; that if not the renunciation of the will of 1813, made in the most solemn form in the dismissed bill, as amended, and supplemented and dismissed, was a bar to setting up title under the will, after defeat as heir at law; and set out full defence to the bill by either denial or confession and avoidance. In the answer, and in response to the interrogatories propounded by the bill, answered: that the City bought of E. Blanc, and believed that he bought of Mary Clark, and that the property at one time did belong to the succession of Daniel Clark.

That the City did claim to be the owner of a portion of the property claimed in the bill; set out the succession of govern-

ments or changes in the charter of New Orleans; that the title of the City came by purchase of one of the former corporations from E. Blanc: that the old First Municipality while the government of the portion of the City including this tract of land, divided the land into blocks and lots as an elongation of the then rear part of the City, annexing a sketch of the platting, designating and pointing out the portion derived from Blanc. That the whole of the lots and blocks, except the square included between St. Peter street, Hagan Avenue, Orleans street and Lake Road, used as the site of a draining machine, and the square between Dupre, Salcedo, St. Ann and St. Peter streets, reserved from sale as a public square, were sold at public auction on March 10th, 1837, and the 12th January, 1846; that the purchasers' names were in a public record in the Conveyance Office; that the City claimed jurisdiction over the streets and avenues for municipal purposes only; that the property in possession of the defendant had yielded no revenue; that none had been received; that the City had not sold or disposed of any property described in the bill, other than as set forth in the statement of sale by the municipal authorities in the answer.

On the 23d of April, 1857, the complainant filed a general replication and the case was at issue on the pleadings, on a new bill between the same parties for the same lands claimed under a title specially renounced in the former bill.

John A. Campbell, who had been one of the leading counsel for complainant in the former bill, had now been appointed one of the Justices of the Supreme Court, and presiding Justice of the Circuit, including Louisiana and did not participate in the trial of the cause while in the Circuit Court. On the 9th of June, 1857, the counsel for the city of New Orleans, moved the Court that the heirs and legal representatives of the succession of E. Blanc, from whom the city purchased, be notified of the suit in order that the city might be protected in its rights as warrantor in the event of eviction, a copy of an order to that effect was served on the heirs named, and due return made; the complain-

ant moved the court to strike the order from the record as no such proceeding was warranted in equity proceedings, the court refused the motion to strike out Rec. 6260, et seq. This the first objection to notifying warrantors I have been able to find in all of these records and it *came from the complainant herself.*

The complainant again resorted to the tactics by which the case No. 122 had been landed in the Supreme Court in detachments in the case of Patterson; stipulation was entered into with Duncan N. Hennen, one of the defendants in the case of Gaines vs. Lizardi, by which the case as to Hennen was hastily brought to final decree of dismissal, and an appeal taken to the Supreme Court in advance to the determination, as to the other defendants in pending cases. The case of Hennen came on for hearing at the December term 1860. The Court as then constituted was then Hon. Roger B. Tanney, Chief Justice, Hon. John McLean, James M. Wayne, John Catron, Samuel Nelson, Robert C. Grier, John A. Campbell and Nathan Clifford, associate Justices. Justice Wayne delivered the opinion of the Court, not only reversing the decree of the Circuit Court, but brushing away the adjudication of Supreme Court in Gaines vs. Relf, in which it had been held that there was no marriage relation between Clark and Zulime Des Granges. Justices Catron and Grier, and Chief Justice Taney, dissented. If Judge Campbell recused himself, as he should have done, and probably did, although it does not so appear, the court divided four to three. It was in this case reported in 24th How. 544, that Justice Wayne stated that this case was in danger of being registered as the most remarkable case in the records of the courts of this country. Beyond doubt any competent and unprejudiced lawyer who carefully reads the opinion in Gaines vs. Relf, 12 How. 472, and turns from its perusal to Gaines vs. Hennen, will involuntarily add to the phrase "or in the records of the courts of any other country." One of the cases is *wrong*, no amount of casuistry can dispose of the fact that the case practically between the same parties, litigating about the same thing, was determined both ways.

It is perhaps, fortunate that however long there may have been interregnum in the operation of the law of *res adjudicata and estoppel by record* that law has again resumed sway and the question of which determination was correct is no longer open to controversy. The city may say that, practically taken as res adjudicata against her though not brought for the same land, and although the city was not a party to the record "is remarkable," yet after the determination of the court in Gaines vs. New Orleans, 6 Wall. 612, where the city *was* a party, it cannot be heard to say that the judgment is wrong and must at least respect its validity.

The decree of this court in this case was rendered in 1861, during the first throes of the rebellion and the commencement of war, and we have stated the case in such full detail because of the significance given this decree as a basis of special damages against the defendant in the pending bill to be considered on this appeal.

The defendants in the new bill against the city (2605), resisted and the case went to final decree, on bill, answers, replication and proofs, and on the 23d of April, 1858, decree dismissing the bill was entered, Rec. 6266. On the 11th of May, 1858, the complainant moved for an appeal from the decree which was allowed with the condition that she give bond with surety in the sum of five hundred dollars. She did not give the bond, and the appeal was never perfected. It was not until the 17th of June, 1865, that she appealed the case. It came up on that appeal and was heard at the December term, 1867, and resulted in re-affirming Gaines vs. Hennen, and a sweeping decree against the city for delivery of possession and an account.

When the mandate came back to the circuit, there was practically no circuit justice, Judge Durell as District Judge, holding the circuit, believing himself interested in the result from having been counsel for some of the parties or possessing or having warranted the title of some of the property coming from the succession of Clark through Relf and Chew or Mary Clark, legatee under the will of 1811, recused himself and would not make any important orders in the case.

On the 28th day of May, 1869, Justice Swayne presiding in the Circuit Court, Judge Campbell again appearing as counsel for Mrs. Gaines, moved that the mandate be spread on the minutes of the court, and that the court make order to speed the cause and for such orders as directed or required by the Supreme Court (Rec. vol. VII,.7396.)

On the same day as counsel for Mrs. Gaines, he asked that the court make orders and decree in conformity with the directions in Gaines vs. Hennen, 24 How. claiming the record to be the same. To this, the defendant's counsel objected ; after hearing argument, Justice Swayne declined to make any order ordering that the matter be continued for further action. As he at once left the circuit this was, practically, a refusal to act.

In 1870, Mr. Justice Bradley, being assigned to the circuit, presiding, on May 27th, 1870, holding court, with Mr. Justice Woods, at that time circuit judge. Judge Campbell as counsel for Mrs. Gaines, moved the case for final decree on June 3d, 1870; afterwards June 6th, was fixed as the day for settling decree ; on June 6th, before the hearing, Myra Clark Gaines came into court and filed the following document under her own signature and that of B. W. Barnes and D. K. Graham. Who these joint signors are does not appear. We do not recognize their names as attorneys, they probably signed as witnesses. (Rec. vol. VII. 7398.)

"And now comes Myra Clark Gaines, complainant, and on suggesting to this honorable court that by virtue of the opinion of the Supreme Court herein given and the mandate thereon, she is entitled to all the property claimed by her and described in her bill of complaint filed herein ; and suggesting further that certain of the defendants have sold or parted with the possession of all or certain portion of said lands, and that she has right to make her election to take the purchase price of said lands so sold or parted with from the said defendants, with interest and the rents and profits of said lands, or to pursue the subsequent holders of said lands for the lands themselves and for said rents and profits, and that she has made her election to take the purchase price of said lands so sold or parted with, with the interest and the rents and profits of said lands, and also to take such portions of said lands as now remain in the possession of said defendants unsold and undisposed of, with all the rents and profits thereof

accrued and accruing, with interest thereon from the date of filing this suit; and on further suggesting that should the court not consider the mover entitled to make her election as hereinbefore made, that in such case she reserves all her rights against all subsequent holders of said lands, putting herself in such case in the same position as she was before making this motion.

It is ordered by the court that she be allowed her said election to take such purchase price and interest and rents and profits and interest thereon from the date of filing this suit from the respective defendants, and that in default of the same being paid to her by said respective defendants, all rights be reserved to her to pursue her said claims against any and all subsequent holders of said lands.

Signed: MYRA CLARK GAINES,
Signed: B. W. BARNES,
Signed: D. K. GRAHAM."

Doubtless Myra Clark Gaines appeared *in propria persona*, because counsel refused to sign or father this remarkable document.

This application was the first indication of a scheme to attack the City a second time, and was in fact a demand for the *land* by reason of the nullity of the deed of conveyance to the City and the *purchase price* obtained by the City. Argument was heard upon this question on the 6th and 7th of June, 1870. On the 9th Mr. Justice Bradley put on record general direction as to form of decree, with an elaborate and clear opinion in writing, reported in *1st Woods Rep.* [redacted], holding that a party in possession of lands, claiming under an adverse but defective title, without fraud in himself or his grantor, cannot be held to be the trustee of the party holding the true title, nor if he has sold the lands made to account for the proceeds of the sale of the lands to the true owner; that the draft of decree presented was in accordance with the mandate.

The draft of decree referred to was made the decree of the court, and was signed and enrolled on the 15th of June, 1870, more than a year after the date of the mandate. This delay was in no manner the fault of the defendant. This decree is given at length in the printed record (*Vol. VII, 7400*), decreed the conveyance from Relf and Chew to E. Blanc, and from Blanc to the City void.

That all of the property belonged to the succession of Clark; that the City account with Mrs. Gaines as the universal legatee of Clark for rents and profits from the *date when the property came into the possession of the City in 1834*, but that it appearing from the record that the City of New Orleans had sold and disposed of certain portions of the land before the filing of the bill, to wit: "all of the same, except the following parcels, which were still claimed and held by the said city at the time of filing said bill, and at this time, that is to say, all of the square comprised between St. Peter street, Hagan avenue, Orleans street and the Lake road, on which the draining machine for draining the city is located, and four other squares comprised between Dupre, Salcedo, St. Ann and Peters streets;" this property the City was directed to surrender, and account for the profits, rents, etc. of the land surrendered. The decree referred the matter of accounts to J. B. Weller, as master, to state the yearly rents and profits of the portion of land ordered to be surrendered and on the balance purchased from Blanc, from the date of the transfer in 1834 until the date when the City parted with possession by sale and transfer. From this decree the complainant never appealed, but availed herself of the decree and insisted on the account.

The master, Weller, proceeded to take an account, and reported that as to the property, excepting the square on which the draining machine was located, the City had never received any revenue, and reported as to that square several estimates. Mrs. Gaines had managed the matter before the master herself; the defendant did not make in proper form any objection before the master, but after the master had filed his report, May 12th, 1871, excepted to the report. The exceptions were heard by Justice Bradley, who settled on the sum of $125,266 79 as the amount of the profits to be accounted for. This opinion is reported *1st Woods Rep. 104.* Decree passed for this sum and costs.

From this decree the City appealed, but was cast in the appeal. This court at the October term, 1872, affirmed the decree of the Circuit Court, and litigation in the celebrated suit 2695 in so far as it was a contest between complainant and the city, was ended.

Not a citizen of Louisiana believed Myra Clark Gaines the heir of Clark, but all knew that her pretended heirship and title was now *res adjudicata* and the property had to be yielded up to her. They paid nearly two hundred thousand dollars in damages and costs for having drained the swamp. Not being willing to await the course of appropriation and collection from the tax payers, she enforced the decree for money against the sureties on the appeal bond. The money was at once attached by her creditors, lawyers who had fought her battles, and capitalists who had loaned her money to carry on the fight. The court held control of the fund and distributed it amongst those holding liens extinguishing her debts to the extent of the amount of money recovered. The tax payers breathed easier and believed they had received the full measure of misfortune that it was in the power of this woman to measure out to them through the instrumentality of the courts; believing that the doctrine of *res adjudicata* was not suspended as to the city, stood in the way of any further experiment on the "Blanc tract," in the way of further litigation with the city or further draft on the tax payer.

On the 27th of May, 1869, Joseph Fuentes and seventy-five others whose title had been attacked by Mrs. Gaines under the will of 1813, went into the probate court in New Orleans, and in due form of action filed their petition, praying that the probate of the will of 1813 be recalled or revoked. The City of New Orleans was a party to this record as one of the petitioners. This record is here in transcript. (*Vol. 4, 3361 et seq.*) On the 8th of June, 1869, Myra Clark Gaines filed a petition, with bond, praying removal to the federal court. This application was refused. Issue was made and the case went to trial and decree annulling the probate. The decree was entered on the 21st of December, 1871. (*Rec. Vol. IV, 3496.*) The opinion of Judge Collins, both on the decree and motion for new trial, are masterly expressions of the facts involved, and the law and jurisprudence of the State of Louisiana, and are here in transcript, Vol. IV, 3477-3478.

From the decree of the probate court revoking the probate,

Mrs. Gaines appealed to the Supreme Court of the State, where the case was heard in February, 1873, and the decree of the probate court affirmed, and the law of Louisiana on the subject of the probate of wills and the effect of ex parte proceedings for probate, on third parties, correctly stated. No Louisiana lawyer would hazard ridicule by denying the correctnesss of the statement of the law as stated in the opinion reported in *25 Ann. 86.*

From this decree of affirmance Myra Clark Gaines on the 31st of March, 1873, sued out a writ of error to the Supreme Court of the United States.

The cause was heard in the Supreme Court, at the October term, 1875. The court reversed the judgment of the State Supreme Court for want of jurisdiction in that court, a bare majority holding that the application of the defendant for removal to the federal court was properly made and in time, and did in fact remove the case and deprive the state courts of jurisdiction.

There was an apparently unanswerable dissenting opinion by Mr. Justice Bradley, the Chief Justice, and Justice Swayne concurring in the dissent.

By reason of this action of the Supreme Court, the record of this cause was removed to the Federal Circuit Court, and afterwards swamped by being submitted to the District Judge, with the Monsseaux and Agnelly cases under some stipulation whereby the case was practically never tried, no statement of facts, no bills of exceptions, no objection at trial preserved. The case was disposed of without any statement of facts found or an opinion on the merits. A formal decree of formal recitals, one of which was that the case was "consolidated" with seven or eight *equity suits* named in the decree, queer companionship, the consolidation of this probate proceeding with equity proceedings brought about.

The decree was in such shape and the trial so irregular, that nothing could be brought up to this court for review.

The court will notice that this proceeding of Fuentes vs. Gaines, was commenced on the 27th of May. 1869, and was formally disposed of the same time with the bill against Monsseaux,

Agnelly and the other bills, in the last general crop of ejectment bills, disposed of by the Circuit Court on the same day in 1877. The transcript of this judgment is to be found vol. IV, 3497.

We have been thus explicit in the statement of this litigation to recall the will of 1813, with the date of the various proceedings, for the reason that in the decree, now here on appeal, the city of New Orleans is expressly punished for participating in this litigation, and its right to take part in any inquiry into the validity of the pretended will of 1813, denied and practically decreed a tort for which indemnity can be decreed in equity.

It is necessary for a full history of the steps taken by the complainant, to go back to the breaking out of the rebellion in 1861. During the early part of that year, the judicial authority of the United States in Louisiana was overthrown; Judge Campbell, shortly after the determination of the case of Gaines vs. Hennen, 24th How. resigned; Judge McCaleb, the district judge, abdicated, and a Confederate District Court, with a judge appointed by the Confederate Government, at Montgomery, was set up in place of the routed federal court.

The rebellion had military possession of New Orleans until the summer or spring of 1862. After the capture of New Orleans, McCaleb, being in fact the Judge of the district, never having resigned, kept himself beyond the military lines of federal occupation, making a dead lock in the federal court until some time in 1863, when upon report that McCaleb had died within the enemy's lines, E. H. Durell was appointed United States District Judge, for the Eastern District of Louisiana, and the Federal Court reopened after an interregnum of about three years.

While the Confederacy was asserting judicial authority in New Orleans, Mrs. Gaines accommodated herself to the changed political conditions in the locality, and went into the Confederate District Court in New Orleans, alleging herself to be of the District of Columbia, and instituted one hundred and thirty-seven suits at law against persons charged to have been in possession of portions of the estate of Clark, she claiming the property as uni-

versal legatee, under the 1813 will. In some of the cases there were pleas of *alien enemy*. No result was reached in the Confederate Court; she did not sue the City of New Orleans, in the Confederate Court, evidently, she had found counsel who told her that ejectment only lies against the parties in *actual possession*. The transcript of the proceedings in the Confederate Court were offered in evidence before Sabourin, Master, in the pending case, and hence, are here in transcript; why this was done, is one of the many mysteries in this cause. The interregnum in the federal court, growing out of the overthrow of the federal court by the rebellion and the neglect of Judge McCaleb, to either hold court or resign, is charged to the city of New Orleans, and the city punished for it in the final decree now here on appeal.

In the history and statement of this wonderful woman's litigation, we have now reached the point where it is necessary to consider the litigation in the two last ejectment bills, the one against *Monsseaux et al.*, the other against *Agnelly et al.*, the decrees in which the decrees appealed from duplicates against the defendant.

The court will remember that the complainant did not appeal from the decree dismissing her bill against the city of New Orleans, No. 2695, until June 17th, 1865. Rec. vol. VII, 6267. The decree having been entered on the 15th of April, 1858, the appeal was taken more than seven years after the enrollment of the decree appealed from.

The complainant was constantly changing her counsel remunerating those discharged, usually with abuse. She seems now to have found in Stone her then newly recruited counsel, a lawyer who knew that ejectment only lies against the party in actual possession, and after the appeal in 2695; the precise date does not appear in the transcript; she filed the bill in her case against Monsseaux et al. The appearance day named in the subpœna to Monsseaux was the first Monday in February, 1866. Rec. vol. 2, 2204, 2223.

This bill contains the same stereotype allegations of ancestry and legateeship, and was filed against over one hundred defendants,

alleged to be in possession of different portions or subdivisions of the "Blanc tract." The City of New Orleans was made a party to this bill, apparently for discovery only, and demurred to the bill. We cannot find that the demurrer was ever set down for hearing, or that any steps were ever taken towards a decree of any kind against the city.

On the 12th of February, 1870, she filed the bill No. 6085 against Agnelly et al., including the defendant Agnelly and more than one hundred others (Rec. Vol. V, 5304), containing the same dreary recitals as set forth in all former bills. The bill was an ejectment bill to recover the property of which Clark died seized, including the "Blanc tract." The defendants were charged as in wrongful possession of portions of the property situated not only on the Blanc tract, but some of them in possession of other property scattered broadcast all over the state. These suits were made necessary by the blundering of her former counsel, who seemed to believe that realty could be recovered and possession decreed in a suit against parties *out of possession*. For this blunder of incompetent counsel of complainant the city is punished in the decree now appealed from. Both cases, Monsseaux and Agnelly, were heard together, and final decree for possession and for an account was rendered in 1877. The complainant at once took steps to force an account, but had not finished as to all of the defendants, when the bill in the case on appeal was filed against the City of New Orleans.

As it will be necessary in stating the issues made and to be tried on this appeal to state the history and proceedings in these last ejectment bills against Monsseaux and Agnelly, no further detail of these cases will be given here to avoid repetition, beyond the general statement, that as to the actual occupants of that portion of the Blanc tract, which the city transferred to the possession of the vendees at the auction sales of 1837 and 1846, these bills are the first effort of the complainant to eject the possessors by litigation: and that the purpose of the bill now on appeal was

to compel the City of New Orleans not only to pay the money decrees rendered against those found by complainant in possession, but to subject the city to the payment of putative profits for all of that portion of the "Blanc tract" which has been *out of the city's possession since the sales* of 1837 and 1846: not because the city was *primarily liable* to the complainant, *not because* there existed an *original* obligation to pay the enormous sum of money decreed, but *because a secondary obligation* to respond to the complainant in the sum decreed has grown out of torts and wrongs *other* than purchasing the estate from Blanc, wrongs which the complainant charges were committed by the city in defending against her claim of title. The language of the decree appealed from practically is: That the tax payer of the city must now pay two millions because the citizens and inhabitants of the city who were the contemporaries of Clark and who knew him, his standing and temper, who knew Zulime Carriere, did not believe that any court could find the suspicion or ghost of virtue in the fetid life of Zulime Carriere, or decree anything of legitimate origin bred by her during the interval in her disgraceful life, intervening between the time when she was suing Des Granges for alimony that could only be due her as *his wife*, and the day and date when she recruited Dr. Gardette as husband, Des Granges not having been removed out of the way by either death or divorce.

Because the city did not believe that the courts would punish an entire community because the unnatural mother of the complainant living within a few blocks of the charity home of her offspring, concealed her history, did not make her maternity known or contribute her support.

Because the inhabitants of the city could not comprehend how S. B. Davis should conceal from Myra Clark Gaines her origin and refund to the executors of Clark's estate under the will of 1811, money, which he says, was confidentially put in his hands to aid in the support of the complainant, when he could report to her anything but a disgraceful origin, and in retaliation for the effort to force from him the small sum of money given him by

Clark for the support of a bastard child, he could have claimed the entire estate for his ward.

Because, those that knew Clark in his life time, and were his associates in society and in business, who knew him as the trusted representative of the United States, when Louisiana was alien territory, knew him to be the trusted friend of Monroe, Livingston and Mazureau, did not believe that he would look for a wife in the presiding deity of a corner candy store, or that he would take for a wife a woman whom he must purloin from Des Granges, if she was the mistress of the candy vendor or debauch, if she was his wife and taking her to himself, after he had debauched her, sent her to Philadelphia to be confined, to conceal the fact that she had been delivered of an admitted bastard, when Des Granges had been absent in France for a period longer than the longest possible period of gestation, would then hunt up the "Irish priest" who at once "left for Ireland," and marry the debauched and degraded woman, still concealing the existence of the illegitimate Caroline. Or that Clark was cur enough after such marriage to complacently see his wife marry and cohabit with Gardette, dishonestly consoling himself by attempting to marry into one of the most respected families in Maryland, at a time when the felony of the act would not only have been promptly met not only by infamous punishment but with the *law duello*, then in vigorous force, by which he would have been compelled to stake his life against every male relative of the deceived woman, both in the direct and collateral line, who chose to call him to account for his rascality.

Because knowing the devious ways of the complainant they did not believe that her pretense adopted for purposes of strategy that she was not warring for gain or money but to vindicate the memory of her parents, would ever become a potent factor in shaping the opinion of any man, when the best showing she ever sought to make for Clark or her father was that he was too degraded for human respect, practising felony as recreation whose last act if it was what she claimed it to have been, was to

deliberately swindle his own mother out of her legal rights as his heir at law.

A model daughter who shed lustre on the memory of her mother and returned her as recompense for her supposed liberality in donating to her all of her pretended rights, as widow in community by meeting her sister in full blood, Caroline Barnes, when she set up Clark as *her father* and demanded a share of the succession with an unsavory supplemental bill in which Caroline Barnes was denounced as the *illegitimate offspring of Myra's own mother.* God save any other member of the human race from such vindication of character and reputation as Myra dealt out to her own mother with prodigality of mendacity, inspired by greed of gain.

For money she was willing to spread on the public records of her country, and prove if she could, that her sister in full blood was a nameless bastard, and her mother either a debauched wife or conscienceless prostitute when prostitution was felony, not only guilty of fraud upon public morals but trespass on pre-existing marital relations and obligations.

Because those who knew all of the parties whose acts are or were involved, or considered in all of this litigation and pretence of heirship and devise, could not know that the courts would at one time rule that the complainant was an adulterine bastard, at another that she was the offspring of lawful marriage and honest bed.

The courts had held that the ecclesiastical proceedings by a score of lying witnesses swearing when they thought the record lost, sworn in the interest of complainant to establish bigamy in Des Granges, could be given in evidence to disprove the lying statement of witnesses as to the result of the proceedings, they could not know that the courts would afterwards determine that the record of the proceedings in the ecclesiastical tribunal could not be taken as evidence of anything even to disprove false witnesses testifying falsely concerning the proceedings and the result, because, although the proceedings were actually had, the *church was*

without jurisdiction to entertain the inquiry. They knew that the country and the courts knew that Zulime Carriere was present in New Orleans when the proofs in No. 122, the case against Relf and Chew were taken, that by the rules of evidence, rigid as those rules then were, she was competent as a witness to prove matters affecting her status and relation to Clark; they also knew that by alienation to her daughter, Myra, of all possible pecuniary interest she could have had in the succession of Clark, even if she was his widow, she had removed all possible ground of exclusion as a witness by reason of pecuniary interest in the result. Yet the complainant did not dare call her mother to establish her legitimacy.

Zulime Carriere was indeed in a dilemma into which the degraded and vicious only fall. If she swore that she was the wife of Des Granges at the time she was sueing him in the courts for a wife's alimony, she not only bastardized Caroline Barnes, born while Des Granges was away in France, but made her younger daughter Myra, an adulterous bastard, incapable of taking either as heir or by devise and drove her bill out of court.

If, on the other hand, she swore that she married Clark, and was his wife when she married Gardette, she bastardized the issue of her life with Gardette; and placed her three Gardette children in such position that they could not inherit in Gardette's succession either as heirs or by devise, under the law of France, where Gardette lived at the time of his death.

Because of all this, and of a firm settled conviction of an entire community that no number of decrees ever could disturb as unsettled, solemn decree that the claim of heirship and title by the complainant was groundless, because the community, through its municipal officer or representative, deemed it not only its right but duty to contest under the form of law, suits instituted by her against them, and approved the defence made b y others against what an entire community believes an unjust claim, the entire city must pay as the price of its incredulity, fictitious, unreal, pretended rents and profits on property for nearly one-half of a century of

time, and that on a bill that avers the City of New Orleans *out of possession* of the property during the entire period covered by the account in the monstrous decree appealed from.

STATEMENT OF PLEADINGS AND ISSUES.

The bill was filed August 7th, 1879. In recital, it sets forth the same stereotype story contained in all former bills.

I.

That Daniel Clark on or about the 13th of July, 1813, made a will (the alleged lost will). That in this will, Clark, amongst other things, acknowledged Myra Clark Gaines to be his legitimate child, and bequeathed her, aside from some small, special legacies, all of his property. That the will was admitted to probate in February, 1856. That this will, as probated, is set forth in the printed record of the suit of Myra Clark Gaines vs. the City of New Orleans, No. 2695 of the docket of the U. S. Circuit at New Orleans: the record of that case being annexed and made part of the bill as "Exhibit A."

That the entire estate of Daniel Clark vested in oratrix at the death of Clark.

II.

That Clark made a provisional will in 1811, in which he made his mother, Mary Clark, his universal legatee, and made Relf and Chew, executors.

That the will of 1811 was probated in the City of New Orleans, Relf and Chew qualifying as executors; that the will of 1811 was revoked by the will of 1813.

III.

That she believes she became of age about the 31st of December, 1827. That in tender infancy she was, before the death of Clark, removed to Philadelphia, and was one of the family of, and bore the family name of, S. B. Davis.

That until the date of her first marriage with W. W. Whitney, 1832, she was kept in ignorance of her history and parentag e

or even her name. That after becoming acquainted with her history, on or about the 18th of June, 1834, she instituted suit in the probate court in New Orleans for the purpose of probating the will of 1813. That without any fault of hers, this suit was dismissed, as in case of non-suit, on the 8th day of June, 1836.

That on the 28th day of July, of the same year, she and her then husband, Whitney, instituted a suit in equity in the federal Ditsrict Court in New Orleans, known as No. 122 of the docket of said court; the purpose of the suit was to set up her rights as heir at law or legatee of Clark. That the Supreme Court of the United States held on appeal in that case, that she must probate the will of 1813 before she could recover as legatee: deciding that she was not the heir at law of Clark. That she thereupon took proceedings in the state probate court, and the will of 1813 was probated in February, 1856.

IV.

That in the suit 122 the City of New Orleans was a party defendant; in that bill and in supplemental bil's and amendments, she claimed, besides other lands belonging to Clark at his death, and illegally detained from her, a certain tract of land described in the bill in No. 122, "as" a piece, parcel or tract of land situated in the quarter of Bayou St. John, in the parish of Orleans, containing about 135 arpents, etc.,—the "Blanc tract."

That the city and Municipality *No. One* were made defendants in that bill, in 1836. That afterward, in June, 1849, the First Municipality answered, and "amongst other defenses," admitted being in possession of the land, but claimed title to it through Relf and Chew.

V.

That the bill, 122, having been dismissed, she, in December, 1856, filed another bill in the federal court known as 2695 of the docket, in which as the legitimate and only child of Clark, sole heir and universal legatee under the alleged will of 1813, she sought to recover this same tract (the Blanc tract), and the fruits

and revenues thereof. The bill of complaint in the former suit against the city is made an exhibit to the bill by reference to the copy of that record filed as "Exhibit A," which she prays may be made a part of her bill, particularly that portion contained on pages from 1 to 6 inclusive (the bill).

That the city was duly cited, appeared, and in its answer alleged title to the land in substantially the same terms as the First Municipality had done in No. 122; but that at the time of the suit the city was the owner of but a small portion of the "Blanc tract," to-wit: that portion embraced between St. Peter street, Hagan avenue, Orleans street and Lake road, and a small portion set apart as a public square. That the tract had been divided into lots and squares, and with the exception of the small tract described, had been sold by the city or the First Municipality to divers persons. This answer is made part of the bill by reference to the record of the suit as "Exhibit A."

It is averred that the answer of the city in 2695 was substantially the same as the answer of the First Municipality in the former suit, claiming title through Evariste Blanc, from Relf and Chew, and that all of the property not averred still in the possession of the city had been sold to divers persons, and refers for certainty to the answer of the city in No. 2695, with its exhibits made part of the bill as "Exhibit A."

VI.

That on the 19th of April, 1858, the federal court at New Orleans, dismissed the bill in 2695; that she appealed to the Supreme Court, where the decree was reversed and a decree made in her favor. That on the mandate of the Supreme Court, the Circuit Court on the 11th of June, 1870, made its decree in her favor decreeing her to be the *only* legitimate child of Clark, and entitled to rights as such, that as his universal legatee she was entitled to all of the property of which he died seized, including the said "Blanc tract;" that the sales made by Relf and Chew on the 30th October, 1821, and 26th September were void and in fraud of her

rights; that the city of New Orleans surrender to her all of the property still in possession of the city, and that the cause be referred to J. B. Weller as master, for an account of the rents and profits of the portion of the property still in the possession of the city. A copy of this decree is made an exhibit to the bill for certainty, designated as "Exhibit B."

VII.

That in the proceedings before Weller as master, it appeared that the city of New Orleans and the First Municipality had during their "respective possessions," derived no rents or profits from that portion of the property sold by the city, and that the master so found. "*But your oratrix charges that the reason why no fruits and revenues were so derived, was exclusively owing to the lack and absence of ordinary management on the part of the city of New Orleans, and the first municipality during their occupancy and possession thereof.*"

Averring that, had good management been exercised, or had she been in possession, large revenues would have accrued to her, she does not know how much, but believes twenty thousand dollars per annum, which amount with interest, she prays may be found due and decreed her in an account to be taken in this cause against the city.

VIII.

That owing to the fact that the city sold the property to various parties, as set forth in the answer in her former suit against the city (2695), and by reason of the decree in that case, limiting her to recover only such portions of the property as were found in the possession of the city; it became necessary for her to proceed by action against the parties actually in possession.

That in 1862 she instituted suits against all of the possessors of the balance of the property not recovered from the city, in the District Court, established in Louisiana by the so-called Confederate States, where she was met with the plea of *alien enemy*. That before the cases could be tried, the authority of the Confederate

States, in Louisiana, was overthrown and she could obtain no final decree in the Confederate tribunals.

IX.

That when the federal court was established in Louisiana she filed two several bills against the possessors of the balance of the "Blanc tract," *Gaines vs. Monsseaux, et al., No. 3663,* and *Gaines vs. Agnelly, et al., No. 6085,* of the docket of the Circuit Court. That these suits were against those who were then in possession of portions of the Blanc tract claiming title with conveyance from the city of New Orleans, or the First Municipality in the chain.

That after pleas had been overruled the defendants answered, claiming title with subrogation of warranty from the city or First Municipality. These answers are referred to for greater certainty.

That there was a decree in her favor on both bills at the April term of the Circuit Court, 1877. That the decree was for possession and account of profits, with reference to E. Sabourin and J. W. Gurley as masters.

That as to defendants who did not appear "judgments" *pro confesso* were entered and decrees made against such defendants of the same character as against those who answered. The "judgments" for greater certainty are referred to as of record in the Circuit Court.

X.

That the masters, Sabourin and Gurley, stated and reported account of rents and profits for the period during which the defendants had been in possession.

That in respect of a large number of the defendants the accounts are large in amount. That a large number of the reports had been confirmed and passed to decree. That as to the remaining defendants some reports have been made, and are on file "unopposed" awaiting the action of the court. That Exhibit C, is a detailed statement of masters' reports and decrees thereon.

XI.

She charges "that the city of New Orleans and the First Mu-"nicipality, by their illegal and fraudulent acts and doings, com-"mencing at the time the city illegally obtained possession of said "property, through and by means of the said illegal and fraudu-"lent act of sale from said Evariste Blanc on the 26th of Septem-"ber, 1834, and extending continuously up to the rendition of the "several judgments in said suits, Nos. 3663, 6085, in favor of your "oratrix prevented your oratrix from the possession and enjoy-"ment of the property."

That the First Municipality during the pendency of the suit 122, divided the "Blanc tract" into squares and lots and that this act and the sale of lots was in tort and tended to harass her, in recovery of possession.

That the city of New Orleans and the First Municipality received for the sale of the lots sold, a large sumof money which she thinks, amounted to $400,000, of which money the city has had continuous use for how long she is unable to state.

XII.

That through *mesne* conveyances, the lots sold by the city passed through various possessors and alleged owners to the possession of the defendants in the cases 3663, 6085, each of said intermediate holders holding in tort. That she *does not know the names or residence of these intermediate holders but believes they are either dead leaving insolvent estates or absent from the district*, making it as she alleges impossible for her to summon them into court, wherefore she prays:

"*That the said city of New Orleans as their vendor and warrantor and joint conspirator, may be held to answer and defend this bill, not only on her own behalf, but on behalf of said possessors, with the right reserved to any and all said possessors, should any of them desire to appear and answer this bill.*" (It could not have been expected that any of these unknown intermediate holders would have an aching anxiety to become voluntary defendants in a Gaines' suit).

XIII.

That the rules of equity proceedings did not allow the defendants in suits 3663 and 6085, (Monseaux and Agnelly) to call

their warrantors, to defend, yet they prayed for such call, and that the city had notice of the pendency of the suits and "fraudulently" employed counsel to act for many of the defendants and that such counsel resisted the suits and decrees for rents and profits against the alleged *tort feasors* in possession—the defendants in the bills. That the city further *fraudulently*, after the rendition of the decree against the city in 2695 by the Supreme Court, and in spite of the statement in the opinion in that case in 6th Wall., "it was supposed after the decision in Gaines vs. Hennen, that the litigation pursued in one form and another by the complainant, etc.;" and in spite of the fact as averred that the defendants in the last ejectment bills, were willing to recognize the decision refused or neglected to make or agree to compromise with Mrs. Gaines, (which she avers was petitioned for by the defendants), but by divers machinations and acts of deception, threats and intimidations prevented submission to her demands on the part of the parties sued.

That in further wrong doing and tort the city became a party to a suit in the probate court, in New Orleans, to revoke and annul the probate of the pretended will of 1813. The Supreme Court of the state, recalling the probate; the Supreme Court of the United States, reversing the decree for want of jurisdiction in the state tribunals. That in this proceeding she was again called an adulterine bastard. That as the city knew that the Supreme Court of the United States, had declared her legitimate, it was wrong and oppressive to call her hard names and a bastard after that decree. That all times, since she discovered her parentage the city has been the chief obstruction in her way to recovery.

XIV.

That since decree against the defendants in the last ejectment bills, the defendants therein "*have demanded of the said City of New Orleans to enter into arrangements with your oratrix for quieting said defendants' title, and possession of the respective portion of the property*" decreed out of their possession, "*or to pay them respect-*

ively for the use and benefit of your oratrix the prices which said City of New Orleans and the First Municipality received therefor, and to settle and pay to your oratrix the respective judgments which an account of fruits and revenue and value for use have been or may be rendered against them."

Which, being interpreted, is an averment that the ousted defendants were willing that she should recover *the land, all rents and revenues,* and the *price for which* the land was sold in 1837, provided the city would pay the money necessary to expand the decree to more than double recovery.

XV.

That the defendants in the Monsseaux and Aguelly ejectment bills have not paid the decrees against them as set forth in "Schedule C," and are unable to pay unless the City of New Orleans will pay as alleged warrantor.

XVI.

That the city refused to pay the decrees, or account to the complainant for the supposed revenues and profits of all the holders since 1834, pretending that there were no revenues accruing to the city or the subsequent alleged *tort feasors* holding possession since the city parted with possession. The reason she avers, for non-production of revenues, was due to the fact that the alleged *tort feasors,* holding after the city had parted with possession, did not manage the property, while illegally in their possession with prudence and care. That if complainant had been in possession she would have received revenues. That the city sometimes pretends that it is not liable to her for rents and revenues during the time the city was *out of possession,* by reason of the alleged fraudulent sales to other parties. The bill charges as matter of law that the city is liable to account to her for all putative rents and profits since purchase from Evariste Blanc on the 26th day of September, 1834, for all she believes she could have earned if in possession, no matter who was in possession, or who

was formerly liable to her. That this liability is not only for what the city *might have earned* during the short time between the purchase from Blanc and the public sale in 1837, but all revenues *which ought* to have accrued to *all subsequent tort feasors*, and also the value of the interest and use of the money that went into the city treasury from the sale of the land in lots and blocks at public auction.

The final prayer of the bill is that, the city answer the bill and four several interrogatories propounded with the bill. Although it is claimed that the bill has features of a bill of discovery to the answer to the interrogatories propounded, the oath of the defendant is expressly *waived*.

That the defendant came to an account not only of all putative profits from the date of the purchase from Blanc in September, 1834, to the date when the lots were sold by the city but all conjectural profits which were or could have been received by all holders since the sale of lots to the unknown intermediate holders and the defendants in the recent ejectment bills against Monsseaux and Agnelly and others, up to the date of the eviction of the defendants in the ejectment bills. That the city be held bound *in solido* with all known and *unknown* subsequent possessors for all putative rents and profits, fruits and revenues, and for the decrees rendered and to be rendered against the defendants in the ejectment bills then pending, as set forth in schedule "C," filed with the bill. That all matters and things determined in these suits be held and taken as *res adjudicata* against the City of New Orleans, and for general relief.

We have been thus explicit in the statement of the bill for the reason that in so far as it is not a rehash of all former bills filed by the same complainant in respect of the statement of her *res adjudicata* parentage and legitimacy, and the will probated from the memory of witnesses who claimed to have retained the recollection of the text and chirography for nearly half a century; the document is most extraordinary, evidently the work of a tyro in

equity, with little knowledge of equitable remedies, and less of the serrated boundary line dividing equity from common law.

The bill was filed August 7th, 1879, the subpœna served on the next day, calling for appearance at the September rules, when defendant appeared. On the 6th of October, the city attorney petitioned the Court for extension of time to plead, answer or demur, alleging that the bill was long, that the examination of all the records and matters referred to, necessary before action was laborious; that the then present corporation counsel had had no experience or familiarity with the litigation, asking extension of time until the rule day in January, 1880. The circuit judge extended the time until the rule day in December, 1879, which occurred on the first day of that month.

On the rule day on which pleading was due, E. H. Farrar, assistant city attorney, prepared a demurrer in due form, duly certified and proper form of affidavit and directed a clerk in his office to get the Mayor to subscribe and make the required affidavit and file the demurrer with the proper and due entries made of record, [redacted] by negligence on the part of the clerk this was not done, the assistant corporation counsel not discovering the omission until the next day, when the proper affidavit was made and Mr. Farrar took the demurrer to the clerk's office arriving there at half-past 10 o'clock, A. M., when he ascertained that the solicitor for complainant had early in the morning ordered *pro confesso* for want of plea, demurrer or answer; counsel for complainant was interviewed and requested to withdraw *pro confesso* but refused; when upon affidavit setting out the facts, application was made to the district judge for relief (Rec. 30). To this application the complainant made written opposition setting up curious and unprofessional reasons, amongst others that that bill was not demurable and in substance that the city ought not to defend (Rec. 31). The motion was heard and taken under advisement. On the 6th of December, 1879, the district judge made an order setting aside the *pro confesso* allowing the demurrer to be filed forthwith, on the most extraordinary terms. That the complainant pay all

costs, and file a stipulation to speed the cause and consent to a trial of the demurrer within five days, and in case, on hearing the demurrer should be overruled, the court was to impose further terms (Rec. 32). The demurrer was thereupon forthwith filed on the 6th of December, 1879, the corporation counsel accepting the condition imposed by an entry of acquiescence on the record (Rec. 34). The court ordering the demurrer for trial on the 10th of the same month although it does not appear that the complainant ever took formal issue of law by setting the demurrer down for hearing in the book of common rules.

The demurrer was in form a general demurrer, for want of equity; but on the hearing the defendants assigned in addition to the general demurrer want of equity, special definite specification or causes why the bill should not stand.

That on the face of the bill with the record in the former suit of the same complainant against the same defendant, No. 2695, made part of the bill "Exhibit A," even if the bill had disclosed any equity or cause of action all of the matters were *res adjudicata* in virtue of the final decree in the former suit, acquiesced in by the complainant, and the decree satisfied by the defendant. That all matters relating to the adverse possession of the Blanc tract, which *were or ought to have been determined* in the former suit, were *res adjudicata*, and could not be litigated anew in this suit. That if the bill was for an account of rents, revenues and profits for occupancy or wrongful possession of the "Blanc tract," an account *had been taken* in the former suit and if insufficient in amount, in the opinion of complainant, the matter of account was nevertheless concluded, unless she could open the former decree which could not be done collaterally.

That if the purpose of the bill is to have transferred to the complainant the purchase price received by the city for the sale of lots in the "Blanc tracts," not only is it impossible for her to hold *both the land and price* or take the price without affirming all sales, but it appeared in the former suit, that the complainant by an application in *propria persona* to the Circuit Court, Justice Bradley,

presiding, applied to the court to settle the decree on the mandate sent down by this court, in the former case (2695), in such form as to declare the city her trustee *quoad* the money received from purchasers of lots in the "Blanc tract," and decree the money into her possession. That this application was refused, and the decree as entered, not appealed from by complainant but accepted in form as entered, and that this determination was not only *res judicata*, but acquiesced in by complainant and cannot be again opened or litigated in another bill.

That the pretended grounds of recovery or reasons asserted, as basis of pretended liability to pay the complainant anything, were pretended torts contrived and committed as alleged, for the purpose and with intent to prolong the time involved in obtaining the eviction of third persons, from realty averred in the bill to be *not* in the possession of the defendant, but in the possession of strangers not parties to the record.

That all of said alleged acts if performed or committed, were and are simple torts *quasi offences* and if cognizable in equity were and are prescribed against by one year under the statute of Louisiana. The bill being not for the recovery of specific property but a naked suit for damages in form exemplary, if of any known form of demand. That beyond the objections to the bill on account of former recovery, the bill was not a bill in equity, nor were the matters set forth of equity cognizance. That while it was a pretended bill for relief, it was in fact a demurrable declaration in trespass on the case under the forms of action at common law.

That the theory of the bill if it had any theory, was, that if a *tort feasor* momentarily in tortious possession of realty, by reason of his temporary invasion became responsible endorser for all *tort feasors*, knowingly, wrongfully, invading the same premises by his act of invasion or that he may become so, by acts other than renewed or joint wrongful possession; that it appearing from the bill that the defendant was out of possession and not a disseizor during the

period covered by the bill, there was no cause of action either in law or equity disclosed in the paper.

That it could not be claimed that any matters not otherwise cognizable in equity become cognizable in this cause, by reason of the bill having alleged features of a bill of discovery, that if a bill of discovery lies against a municipal, political corporation to discover the public acts of such corporation, all being matters of public record, and not supposed or averred to be in the knowledge of the then incumbent officers by any other means than by the public record [redacted] thereof, the bill in this cause not only does not aver concealment of knowledge inaccessability, loss or spoliation of records, but does not call for answer of either bill or interrogatories under oath, in such form as accord with, and constitute a feature in all bills of discovery.

That if the bill was intended as a bill for account of rents and profits, the revenues, rents and profits are charged to have been received by, or liability therefor primarily incurred by others than the defendant, the defendant being averred *out of possession* for the whole period covered by the bill, not being even in possession through attorney, or tenants' possession being averred to have been in strangers holding fraudently by pretended title averred to be vicious, making the bill a bill for putative profits not earned or received by the defendant. That equity has no cognizance of such matters, or power, except in patent cases to deal with damages, beyond the actual account of *actual* revenues or profits coming, or in contemplation of law due from the defendant in *possession*. That the doctrine as laid down in *Root vs. Railroad Company. 105 U. S. 189*, was and is a clear and concise statement of the law both in this country and England. That there were no offsets, no items to be charged or surcharged.

That if the bill is to be taken as a bill by complainant to usurp the place of the parties ejected in the supposed contracts of warranty in the conveyance of the city to its immediate grantees in the chain of title down to the evicted, the bill discloses that the

complainant was no party to the agreement: there being no privity. That if she claimed by assignment from the evicted, the transfer was of necessity, the transfer of a *chose in action not negotiable by law merchant*, a cause of action only cognizable at law between the supposed original parties, and not cognizable in any form by the federal court, unless the residence as to citizenship of the assignor was such as to give the federal court jurisdiction *ratione personæ*. That the contrary appeared on the face of the bill.

That if it was the purpose of the bill to compel the city to pay the money decrees against the evicted in the last ejectment bills against Monsseaux, Agnelly et al., the bill does not show any legal or equitable right or ground to such relief against the city. That to make any such decree possible, the evicted defendants should be made co-complainants, or at least parties to the bill. That as the bill stands, if the defendant be decreed to pay the money decrees in question, the complainant would in that event have double recovery; the defendant in the ejectment bills not being estopped from setting up the decrees against them in any action on the supposed warranty of title.

That the entire bill set up as the ground or reason for relief, supposed torts by the defendant that are not as pleaded or set forth torts, for which even a court of law could award damages against the defendant, the alleged wrongs being as set forth, either the lawful exercise of the right to submit disputes or contentions in due form to judicial arbitrament in the courts, or the alleged refusal to pay to the complainant debts, which, if debt, was indebtedness to *third persons* and *not to the complainant*.

That if the plaintiff disclosed any right of action, it is an action at law, with the defendants possessed of right of jury trial, if demanded.

The demurrer was elaborately argued, taken under advisement by the district judge, and on the 23d of January, 1880, he made an order overruling the demurrer, with costs, granting the defendants "*leave, if advised, to file within ten days a demurrer to*

all of complainant's bill excepting that portion which seeks to recover from the defendants the rents and profits acquired or which might by reasonable diligence have been acquired, revenues and value for use from the defendant by the actual occupants of the property described in the bill, namely, subdivisions XI and XII of the bill, and of the printed copy of said bill, the second paragraph of said bill on page 22, the second paragraph on page 23, and the whole page 24, as well as subdivision XV of said bill."

This the defendants never comprehended and could not determine from the order whether the portions of the bill named, were held good or questionable. Then followed probably the most extraordinary order ever made in any Chancery Court.

"And under the reservation in the order heretofore made (to-wit: order setting aside *pro confesso*) and for speeding the cause the court imposed as terms: [redacted] it is further ordered that the "said defendant answer the said excepted portion of said bill "within the period of ten days from the date of this decree, and "that the defendant *forthwith proceed to account before Ernest Sabou-"rin, master, for the rents and profits acquired and realized or which "might by reasonable diligence have been acquired or realized by the "actual occupants of said property including all revenues and value "for use* (Rec. 35).

This order was of such extraordinary character, practically a final decree for an account decreeing the terms of account; that on the 31st of March, the defendants' counsel applied to the court to rescind that portion of the order which prejudged the case and ordered the defendant to an account before answer was due (Rec. 36). This application was taken under advisement by the district judge, and on June 4th, 188 , refused, and *Sabourin*, the master, peremptorily ordered to proceed forthwith to an account (Rec. 62).

With a practical final decree against the defendant as alleged punishment for the negligence of a clerk in the office of the corporation, counsel in neglecting to obey instructions to file the demurrer on the rule day when it was due, the defendant was compelled to *answer* and *account* at the same time. A parallel to this condition of things cannot be found in the records of judicial proceedings on this planet, and it is to hoped that it never will occur again,

and well justifies the horror of equity prevalent in Louisiana. Those unfamiliar with equity proceedings believing that the system warrants such procedure.

On April 9th, the city answered, and as it appeared from the action of the district judge on the demurrer, that the former suit of the same complainant against the same defendant about the same land and the same account was not to be held *res judicata, quoad* anything in the way of a second bill for the same relief the defendant answered the bill as if there had been no former recovery taking issue on every pretense set up in the bill.

Admitted that Clark died in August, 1813, denied on information, that he left a large estate, averring that he died completely insolvent.

Denied that Clark made any will in 1813 and that any estate ever vested in the complainant; admitted that Clark made a will in 1811 making his mother, Mary Clark, his universal legatee, averring that the will was the only and last will of Clark and was probated, and that Relf and Chew, the executors, qualified and acted lawfully.

Denied that the complainant did not become of age or reach majority until the 31st day of December, 1827, averring that she attained majority on or about the 1st of August, 1825.

Denied complainant's legitimacy and averred that long after the year 1832, the Zulime Carriere alleged by complainant to have been her mother, was still alive and that she continued to live until some time in 1853. That the said alleged mother was in all things aware of the exact relation she had held to Daniel Clark; was also well aware of the existence and residence of the complainant, and had frequent communication with the complainant and that it is incredible and untrue that the said complainant was not aware of her history and supposed parentage as early as 1830.

Admits that complainant and W. W. Whitney, her then husband, in July, 1836, instituted a suit in the District Court of New Orleans, being No. 122 of the docket; avers that in said suit the complainant did attempt to set up the pretended will of 1813 but

claimed also of this defendant and others, property which had belonged to the estate of Clark, as pretended heir at law. That the bill was demurred to and in a division of opinion of the Circuit Court and was carried to the Supreme Court, and that court held that the complainant could not claim under a will of 1813 until the will had been probated in the proper probate court; that thereupon, instead of abandoning said suit, she amended her bill in consequence of the ruling of the Supreme Court, and stood on a claim of heir at law of Clark, and for the purpose of making her new position good and available she specially renounced all right, title or interest in the pretended will of 1813, and elected to stand on her pretended rights as heir and upon a pretended transfer to her of the claim of Zulime Carriere to one-half of the estate of Clark as his pretended widow in community.

That in the bill as amended she limited her claim and demanded one-half of the property as the assignee of the pretended widow in community, and four-fifths of the other half as the forced heir of Clark, and in distinct terms abandoned and released the balance of the estate to those in possession, who obtained title from Mary Clark, the legatee, under the will of 1811, and that the property described in that bill was and is the identical property described in the present bill.

That at the time she was of full age, and represented in the record by her husband, acting with his authorization and was then and at all times, since said election has been estopped by the fact and record of her said election from claiming or setting up any title or right under the pretended will of 1813.

That issue was taken on said bill as amended in due form and on trial the bill dismissed, that she prosecuted an appeal to the Supreme Court where the decree of the Circuit Court was in all things affirmed; the record in No. 122 being made a part of the answer as Exhibit "A."

The defendant insisted upon said matter and estoppel to the same extent and effect as if the matter had been set up in a separate plea.

That it was true, that complainant as alleged in the bill on or about the 22d day of September ,1856, exhibited her bill of complaint against this defendant in the federal Circuit Court, at New Orleans, in *Myra Clark Gaines vs. the City of New Orleans, and others*, designated in the bill as No. 2695 of the docket of that court; in which she sought to recover from this defendant, the same tract of land described in the former bill by her claimed as heir at law and assignee of pretended rights of Zulime Carriere, pretending to be widow of Clark, the identical land set forth and described in the previous pending bill being involved.

That in said suit complainant claimed from this defendant not only the said land but also all fruits and revenues, rents, etc., of the same for the identical period of time set up in this present bill, that is, for the term commencing on the 26th day of September, 1834, the date when Evariste Blanc conveyed the land to the city, and to be terminated on the day and date of the delivery of the property to the complainant.

That the said demand for rents, etc., in suit No. 2695, was in all things, in form, range and extent, the same as made and demanded in the bill of complaint in this cause, that her demand in the pending bill is but a renewal of the demand made in her former suit, No. 2695.

That this defendant, as appears by the record of cause No. 2695, made a part of her bill, joined issue on said bill by answer, to which there was due replication, and the cause went in due course to final hearing on bill, answer, replication and proofs, on which hearing the bill was dismissed by the Circuit Court, with costs, and without any reservations. That from this decree the complainant took an appeal to the Supreme Court, where the decree of the Circuit Court was reversed, and the cause remanded for decree in conformity to the opinion.

That when the mandate came back to the circuit, proceedings were had to settle and determine the decree which should be rendered to conform to the direction of the Supreme Court, by which the Circuit Court became charged with the jurisdiction and

duty to settle a decree and fix the extent, character and amount of money for rents, revenues and profits which the complainant should or ought to recover from the defendant by reason of its relation to the said tract of land claimed in the bill. That the court did so act and made a decree which is of record, an exhibit to complainant's bill, and to which the defendant referred for certainty.

That by the terms of this decree the cause was referred to a master in chancery, John B. Weller, to ascertain and make report of all rents, profits, revenues and moneys which the complainant ought to receive from the defendant in this cause; that the master in due course of proceedings in that cause, did determine, ascertain and make such report of the sum so due. That the court on hearing exceptions to said report, on behalf of the defendant, decreed the defendant to pay the sum of $125,266 79, with interest, as decreed. The defendant prosecuted an appeal to the Supreme Court, where the decree was in all things affirmed, and in all things thereafter paid, discharged and satisfied by this defendant. That the complainant accepted satisfaction of said decree, and in no manner appealed therefrom; that the decree now stands, and is a final decree which this defendant has in all things conformed to, paid and satisfied, and has at all times stood and still does stand as the solemn final adjudication and determination of all matters, things, disputes and contentions between this defendant and the complainant about or concerning the land, rents, revenues and profits described in the bill of complaint in this cause, and of all things, matters and controversies which were or *ought to have* been determined by said suit and final decree.

The defendant insisted on said matter so set up, to the same extent as a defense, as if the same matter had been specially pleaded on a separate plea.

That the defendant was a stranger to the pretended proceedings in the Monsseaux and Agnelly cases, and if in any manner pertinent demanded strict proof in all particulars. Had been informed and believed that many of the pretended decrees in those

cases were null and void for collusion between the complainant and the defendants in the decrees—for want of any service on the pretended defendant, and from the fact that many of the decrees were taken against persons who were dead, either at the time the decrees were rendered or at the institution of the suit, and against whose representatives or successors no proceedings had been taken or attack made.

The answer denied specially all manner of frauds against the complainant, or that defendant ever had any fraudulent or dishonest dealing in respect either of the defendant, her litigation or the property described in the bill, specially denying that at the time of the purchase from Blanc, or at any time since that date, the defendant ever believed that the complainant had any right, title or interest in any estate left by Clark, or that she was his heir, or universal legatee, by any will ever made by Clark, or that defendant ever would have purchased the property of Evariste Blanc, if it had the slightest suspicion of defective title; that the complainant knew this to be the fact when she filed her bill.

That possessed of a full belief of its title, the city caused the land to be platted and divided into lots and blocks in the years 1836 and 1847, exposed the land for sale at auction in open, public manner: the property at that time not being wanted for public and municipal use.

That the property never was the source of any revenue whilst the city had possession; that it was in fact a cypress swamp, to reclaim which would require the expenditure of large sums of money, and could or would only be accomplished by individual owners willing to expend large sums of money to reclaim the land, in hope of future profit. Denied that the subdivision of the land into lots and blocks was made with any intention or belief that it would hinder or obstruct the complainant in any legal proceedings or other means she might adopt to assert title; and at the time of such subdivision had no suspicion, belief, or ground of suspicion or belief, that the complainant could or would ever assert any title to the land or any portion thereof.

That it is not true that the defendant ever received the sum of $400,000 for land sold by defendant and included in the tract described in the bill. That the lots sold at public auction in the years 1836 and 1847 were subdivisions of the "Blanc tract;" that it is not true that Daniel Clark ever owned all of the "Blanc tract," or that the chain of title came through Daniel Clark, or Relf and Chew, as executors of the estate of Clark, or agents of Mary Clark, legatee under the will of 1811. That the so-called Blanc tract, consisted not only of property purchased by Evariste Blanc from Relf and Chew, but a large portion of the Blanc tract was acquired by Evariste Blanc from other sources than the succession of Clark; that the most valuable portion of the tract did not come from the succession of Clark.

That the gross sum received by the city for lots sold in the Blanc tract did not exceed the sum of $126,000, a large portion of which was the price of lots situate on lands that never came to Blanc from the estate of Clark, and to which Clark never claimed or had a shadow of title. That it is impossible to state at this date the exact portion of the $126,000 which came from the sale of lots situated on the lands claimed by complainant, but avers and believes that the sum did not exceed forty thousand dollars, but that the exact sum could only be ascertained by a most careful survey of the lands and fixing the boundary line between land coming from the estate of Clark and acquired by Blanc from other sources.

That all of the matters set forth in the twelfth and thirteenth subdivisions of the bill are in all things untrue.

That it was the notorious and confirmed belief of the public and all persons in any considerable extent informed as to the course and detail of complainant's acts and litigation, that the case of Gaines vs. Hennen, referred to in the bill, was a fraud upon the courts, was instituted and carried on under the terms of a collusive agreement that Hennen should escape all loss, damage, and payment of money in the event of a decree against him, and instead of impressing the public of New Orleans that her demand and claim of title was fair and honest, created the contrary belief;

that the pretended title could only be made effective by cunning, fraud and deceit in collusive litigation.

That the matter set forth in the 15th subdivision of the bill, averring that none of the decrees in the Monsseaux and Agnelly bills have been paid, and that the defendants in decree are insolvent and unable to pay is untrue, as set forth.

That while all of the acts of complainant are not known to defendant, yet defendant is informed and believes that a large number of the supposed decrees set forth in "Schedule C," filed with the bill, are void for want of any service on the defendants, who were never given any day in court. That some of the defendants in the decrees were dead when the bills were filed; that a large portion of the supposed decrees, if otherwise valid in form, relate to property never in the possession of the defendant.

That as to some of the decrees, there was no honest litigation or controversy, that decrees *pro confesso* were allowed to pass into final decree with fictitious and unreal profits allowed in the hope on the part of the defendants to lay the basis of large and fictitious demands against this defendant under its supposed warranty, and to that end agreed to eviction and decrees for extortionate and fictitious profits. That in other cases the property being comparatively worthless, when compared with the prices bid in the speculative and flush time when the land was put up for sale in 1836, before the money panic, of that and the succeeding year, the defendants had come to appreciate their supposed construction of the supposed warrant of the city higher than the lands and were anxious to be evicted and willing that extortionate rents should be decreed due from them, having a fraudlent understanding with the complainant as to the real sum to accrue to her as rents and profits.

That the pretense that the complainant has now or ever had any claim or right in or could claim the benefit of any condition or stipulation of warranty contained in any conveyance of said property by the defendant was and is untrue in both fact and law.

That all of the persons to whom this defendant can in any manner be claimed to hold the relation of warrantor by direct contract or by any subrogation for any of the lands claimed by complainant were and are citizens of and while living, resided in the State of Louisiana, and that the persons named in "Schedule C" filed with the bill who are still living, are and were, when the bill was filed, and still are, citizens and residents of the State of Louisiana; that as to each and all of them they could not invoke the jurisdiction of the federal court in Louisiana to enforce such supposed warranty against this defendant, nor can the complainant by any contract or convention with them get any right which could not be sued and enforced in the federal court in Louisiana, the court being without jurisdiction *ratione persona*. That from a large number of said supposed contracts of warranty the defendant is forever relieved and discharged if the supposed contract ever was binding and obligatory.

That defendant is informed that all of the alleged decrees, and all supposed rights of action against this defendant growing out of said pretended decrees, have been sold, transferred and alienated to third persons, other than complainant, and that this was *done before* either of said ejectment bills were filed, and she has no right of action on said supposed warrantees either by convention or by reason of any act of the supposed warrantees.

That the defendant has in many cases full and complete defence against any action of warranty by supposed warrantees, growing out of the acts of the warrantees in said supposed contracts of warranty.

That the pretense that the supposed warrantees, claiming to hold the city obligation of warranty relating to said lands, have ever demanded of this defendant or requested that this defendant acknowledge and discharge a supposed obligation of warranty by payment to the complainant, is false and untrue, as complainant well knew, and that if such demand or request had been made as averred, such act would create no obligation on the part of the defendant or confer any right on the complainant in the event of

refusal to conform to such demand or request, nor vest her with any cause or right of action.

That it is true that in her former suit against this defendant, No. 2695, she obtained a final decree and that after further resistance was vain, the decree was conformed to and paid, and that in that suit complainant has recovered and was paid and this defendant discharged of all demand she had or possessed for any rents, revenues, damages or claims, demandable from the defendant by reason of its purchase, possession and sale, of any of the property described in the bill or contained in the "Blanc tract." That the pretense and charge that the defendant has paid no revenues is untrue and in all respects false, as complainant knew when she made the allegation.

That the allegation that the complainant, had she been in possession since 1834, would have realized large profits from such, is also untrue; that it is notorious and true that at the date of the sale of the lots, the land in question was largely an unreclaimed cypress swamp and uninhabitable, and it was only after the city had expended over one-half million dollars in ditches, canals and embankments and for artificial drainage, that the property became inhabitable in any respect. That the sums expended by the city in reclaiming and draining the property and protecting it from inundation, exceeds by far the largest sum that could have been realized by any possible providence of management or enterprise on the part of owners or possessors, and that all pretenses in the bill to the contrary are false and untrue.

That if it was true that the defendant had committed any or all of the torts, wrongs and offences charged in the bill, that all and singular the same were done and committed more than one year prior to the filing of the bill or service of subpœna on defendant, and that by force of the statute of Louisiana, all right of action therein, if the same ever existed, was and is prescribed against by the lapse of time, and defendant pleads prescription of one year.

That as to all demand for account of profits or account, the defendant pleads prescription of three and ten years.

That the defendant, if she ever had any right of action about and concerning the matter set up in the bill, has had such right of action since 1834, and has been aware thereof, at least since the date of her institution of her former suit against this defendant No. 2695, in 1856, and unless all of said matters were involved in said suit in 1856, and disposed of in the final decree therein, she has in no form instituted any suit or action for redress of said supposed wrongs, until the institution of this suit, but has in all things failed and neglected so to do; that at all times since 1856, complainant has been of full majority, over twenty-one years, and that prescription has in no manner been interrupted or waived by defendant, but has continued to run and is in all things complete and effective against any supposed right of action attempted to be set forth in the bill, setting out the usual general traverse of all matters not specially avoided or denied (Rec. 36, et seq.)

The defendants answer to the special interrogatories are lost from the record, but it was stipulated in making up the transcript, that the answer to the second interrogatory was, that Miles Taylor, James McConnell and John H. New, were the only counsel ever employed by the city, and that the terms of their employment and powers were defined in public ordinances of the city.

And to the third, that but one petition had as the defendant believed been presented to the city; that that was referred to the city attorney who had not acted because of this suit, and that the defendant is informed and believes that all petitions ever addressed the city of the character referred to in the interrogatory have been prompted and instigated by the complainant.

While the exact text of the answer to the first interrogatory could not be stipulated, the "Document A," made part of the answer, indicates the nature of the reply to this answer.

The complainant filed twenty-eight so-called exceptions for "scandal and impertinence" (Rec. 49). These exceptions were overruled.

On May 6th, 1880, the complainant obtained relief and amended her bill, by filing a species of argument or brief, containing a criticism on the answer, but without introducing either new matters or new issues (Rec. 58). The defendant answered this new matter on the 2d of August, 1880, and on the same day the complainant filed a general replication, and the case which had *all of this time been before the master on practical, final decree for account* was at issue on the pleadings.

The master, Sabourin, made hot haste to urge on the reference for account, although the defendants had alleged dissatisfaction with the character of Sabourin, and prayed the designation of another master if the order of trial must be inverted and the accounting go on while the case stood at rules for evidence and proofs, and had been refused another master (Rec. 62).

On the 17th of August, 1880, the master summoned parties before him and the complainant, assuming that Sabourin was to try the case and take all of the evidence, proceeded as if he was the examiner as well as master, although F. A. Woolfley, the clerk of the court, was the duly appointed examiner.

On the opening of the proceedings before the master, the counsel for the complainant limited the commencement of the accounting, so that it was to commence *not when the city purchased from Blanc on the 21st of September, 1834, but to commence at the date of the auction sales and adjudication of the lots by the city and the property passed out of the possession of the defendant into the hands of strangers*, thus presenting the extraordinary and unprecedented spectacle of an attempt in equity to take an account of alleged profits not accruing as revenue or fruits of lands, and *which ought not* to have accrued to the defendant, the defendant being by the complainant averred on the record *to have been out of possession* for the entire period for which account was demanded.

This proceeding simply constituted the master, a sheriff's inquest or jury of one to assess damages for alleged naked tort relating to realty which, at common law, could not have been recovered in any form of action and if sued for must have been

sued in *trespass on the case or special action on the case.* Equity and equity proceedings are not indigenous in Louisiana.

The master was very objectionable to the defendant, who was impressed with the belief that being largely interested in unpaid fee allowances in the Monsseaux and Agnelly ejectment bills, he would endeavor in some manner to make his account good by fastening it upon the city. All efforts to secure another master failed. The master, construing the order of reference to him as a practical final decree, made before any issue of fact had been joined in the case, treating the proceeding before him as a *sheriff's* inquest, heard and took all manner of evidence and finally, after being ruled by the complainant several times, on the 19th of March, 1883, made an extraordinary report, to be found on page 869 et seq. Both sides excepted to the report, the defendant without avail, the complainant successfully to the extent of swelling the account thirty per cent.

The case at this time had not been carried to final hearing but was still open the complainant not having offered any proof except on the hearing before the master, deeming the order of reference to have been a decree in her favor. The master held back the evidence until the report of March 19th, 1883.

The case was called for final hearing and *upon the exception to the master's report at the same time,* and finallly submitted to the district judge on April 27th, 1883.

The report dealt with the case as if there were no defences set up, or necessity for final hearing on the merits. As this report must be hereinafter dealt with in detail, but a general summary will be given here.

The master dealt with every lot and block in the supposed "Blanc tract," irrespective of any compromise made by the complainant with the defendants in the ejectment bills, without regard to cases where want of service on defendants was patent on the record, or the fact that the purpose of the present bill, if it had any purpose, was to give the complainant a double recovery for pretended profits: one recovery against the *evicted*, and another

against the *defendant*, with no discharge or estoppel of any supposed demand in warranty on the part of the evicted, nothing which the city could plead as a defence in any action on the supposed warranty contained in any conveyance by the city or the First Municipality.

It adopted, against objection and protest, *all of the reports* made by himself, J. Ward Gurley, J. Ward Gurley, Jr., and other masters appointed in the ejectment bills against *Monsseaux et al.* and *Agnelly et al.*, and held the amounts found by those masters the measure of recovery for the *period of possession by the evicted*, charging five per cent. interest on that amount, which he made erroneously to be $576,707 92, if the deduction of the district judge in his opinion and decree is justly made from the report (just how it was made is not apparent).

As to the balance of the period not covered by the decree acting under the written request of counsel for complainant, he commenced his account from the date of the conveyance of the lots by the city the 10th of March, 1837, the date of the auction sale, and came down to the supposed date of the decrees against the defendants evicted. He pretended to take the price at which the lots were sold in 1837, and as to the lots conveyed to the city as legatee of McDonogh, sold at a subsequent date, and considering that the prices in 1837 might be inflated by reason of the speculative fever at that day, deducted *thirty per cent.* from that price and fixed the value for the purpose of accounting for vacant lots, and unimproved property at *seventy per cent. of the 1837 prices.* By a process of assumption utterly unwarranted by either fact or the evidence, he declared, that if the *tort feasors* who held possession during the period, *both as against the city and the complainant*, had used good business judgment they would have or could have realized *five per cent. per annum on seventy per cent. of the 1837 prices* as rents and profits from the occupancy, although he does not know or attempt to learn the names of the supposed occupants from 1837 down to the date accounted for in the decrees in the ejectment bills against *Monsseaux* and *Agnelly.* There is not one par-

ticle of proof that as to all of the vacant and unimproved property, there ever was anything to prevent the complainant making entry at any time on the strength of her pretended title. This five per cent. on seventy per cent. of the sale price he makes amount to $824,660 12, which he calls "*rent.*" On this sum he charges five per cent. per annum interest, and makes this amount to $797,401 58, or a total of "*rent*" and *interest* $1,622,061 70. (Rec. 978 et seq).

A more disgraceful document never formed part of the records of any court.

On the 27th of April, 1883, the cause was submitted to the district judge holding the circuit; six days afterwards he filed a written opinion overruling all of defendant's defenses and exceptions to the report of the master, sustaining the exception of the complainant that one hundred per cent. of the prices obtained in 1837, instead of seventy per cent., should have been the basis on which alleged putative profits should have been calculated; added thirty per cent. to the amount found by the master as "*rent,*" and thirty per cent. to the estimated gross interest.

On May 5th, 1883, he signed final decree against the defendant for $576,767 92, to duplicate and cover the supposed decrees in the Agnelly and Monsseaux ejectment bills, and for the balance of the time from 1837, not covered by the decrees and account in the last named ejectment bills, *one million three hundred and forty-eight thousand nine hundred and fifty-nine dollars and ninety-one cents*, making the total decree a money decree for one million nine hundred and twenty-five thousand six hundred and sixty-seven dollars and eighty-three cents ($1,925,667 83), with interest at the rate of five per cent. on the sum of $950,110 00 from the 10th of January, 1881, "*and in the further sum of thirty-four thousand dol-*
"*lars, the amount of costs heretofore taxed against the several defendants*
"*in suit of Myra Clark Gaines vs. P. H. Monsseaux et al., numbered*
"*3663, and Myra Clark Gaines vs. P. F. Agnelly et al., numbered*
"*6085 upon the docket of this court, the names of said defendants being*
"*set forth in schedules or exhibits C1 and C2, annexed to complain-*
"*ant's bill of complaint in this cause, with interest at the rate of five (5)*
"*per centum per annum till paid, from January 10th, A. D. 1881,*

"*with costs of this suit, and that the said Myra Clark Gaines have "execution against the said City of New Orleans for said sums of "money, with interest as aforesaid and costs.*" (Rec. 1101 et seq).

When, by whom, and under what circumstances the costs in the two ejectment cases had been taxed at an even $34,000 does not appear, but the presumption is, that Sabourin, the master, had accomplished his end of a judgment against the city for his supposed master's fees in the former suits, a matter, which it was charged, made him interested, and for that, amongst other things, unfit for master in this case.

The complainant had not only *double recovery* for nearly a half million dollars, duplicating her decrees against defendants in the lost ejectment bills, with no subrogation on the part of the city, in case of payment, there being in law, no privity between the possessors evicted as defendants in the ejectment bills, and the city as defendant in this bill, and this decree not pleadable against the holders in possession in the event of a suit against the city on the supposed warranty clause and subrogation from vendor to vendee alleged to be in the deeds of conveyance constituting the chain of title from the auction sales of 1837, to eviction by the complainant.

The proof and evidence returned by the master, with his report, was all taken under objection, although it was not known by the defendant that the evidence taken on the proceedings to account before the master would constitute *all* of the evidence of complainant on the formal final hearing, if the so-called trial of this case after the master had stated an account, can be termed a trial of the cause.

The evidence on the part of the complainant was from beginning to end inadmissible as evidence of anything with which the court could deal. It consisted of the records in the case No. 122, which was referred to in the recital of this bill; the record of the former and terminated suit against the city (No. 2695); the record and evidence before the various masters, and the reports of masters accounting in the Monsseaux and Agnelly cases; the final

decrees against the several defendants in the latter cases; the deed of conveyance from Blanc to the City of New Orleans: a specimen conveyance from the city to those who bought of her at the auction sales in 1836 and 1846, or at the sale of that portion which came into the possession of the city afterwards by bequest of McDonogh in trust for educational purposes: some purported copies of alleged ground rent contracts made by Clark during his life time, relating to property in other parts of the city; the evidence of some witnesses as to the topography and character of the "Blanc tract." The mass and bulk of the evidence, however, consisted of city ordinances relating to the employment of special counsel in the former suits against the city; the volunteer opinion of lawyers, not the counsel of the city, evidently part of the artillery used by Mrs. Gaines in some of her many efforts to induce the city to buy peace at any price; the brief of counsel for the city filed and used in the Supreme Court of the United States in the case of New Orleans vs. Gaines (No. 2695).

The appeal of that case and the effort of counsel to convince the Supreme Court that the decree of the Circuit Court ought to be affirmed, it now seems was a crime, for which the city must respond in damages.

As the evidence offered before the master on the reference for account which, by inverted order of trial came before final hearing, and which, after report of master, was relied on both to sustain the master's report and establish the bill, must be dealt with hereafter in detail to avoid the repetition of the same matter, will not be dealt with in detail and by analysis now, but reserved until the case is considered on its merits, if any merit it has.

As a suit at law, or any other recognized form of action known to courts at any age of the world, the pleading is demurrable and insufficient for want of properly set out averments of matter showing that the defendant who was also defendant in all of the litigation complained of except the Fuentes suit, instituted and carried on the suits in malice, having good reason to believe that it was setting up sham complaints and knowing that it had no

real or substantial rights involved or defenses, nor does the paper show any right to the damages asserted as the measure of damage to plaintiff or recovery from the defendant.

In order to determine whether there is equity jurisdiction and the consequent right to exclude the defendant from its constitutional right to a trial by jury, it is indispensable to determine as near as possible, what is intended to be set up as matter of equity cognizance by the pleader who *framed this extraordinary document.*

STATEMENT OF POINTS OF LAW INVOLVED, AND REASONS WHY THE BILL SHOULD HAVE BEEN DISMISSED IN THE CIRCUIT COURT, AND SHOULD BE DISMISSED IN THIS COURT.

1. The case is not of equity cognizance, the Circuit Court was without jurisdiction in equity *ratione materia.* The demurrer for want of equity was well taken and should have been sustained.

The paper termed a bill is unlike anything before that time known to man; it certainly bears no more resemblance to a bill in equity than it does to a parliamentary bill of attainder.

The paper is of such multiform character that it is extremely difficult to determine upon what the pleader depended for semblance of equity cognizance, or the ground upon which he placed his right to relief of any kind. The paper is nearer to a badly pleaded declaration in a special action on the case for fomenting litigation.

The task is made difficult from the fact that the pleader evidently did not himself know, and on the hearing in the court below could not or would not respond to reiterated demands for explanation.

The district judge who rendered the decree, attempted to dissect the bill, to reach the skeleton of an equity case in this document, remarkable for the thickness and density of adipose statement covering the frame, if it has any frame.

The opinion of the district judge is here in transcript (*Vol. I, 1082 et seq*). Although he states: "The conclusion is unavoidable that this suit is properly brought as a suit in equity," the reasons

given for that conclusion drawn from his construction of the bill its range, meaning, object and import, we respectfully submit, negative the conclusion and make the determination most unnatural and inconceivable.

Although the opinion will be dealt with, as a whole, in an appendix, it is proper here to extract from it his construction of the bill, and his reasons for assigning the matters set out and relief prayed for to the arbitrament of equity.

He says; "*There can be no doubt but that this cause is one over which equity must take cognizance.*"

That is, the demand is imperative; about the duty there can be debate. Such a conclusion should be accompanied with demonstration where equity is called in to invade new fields; yet the reasons given seem most lame and impotent.

The first reason given is: "It is an incident and in its nature a supplemental proceeding to a litigation as to heirship and the title of the complainant to real property which has been conducted in this court between the parties hereto, for upwards of forty years, and always on the equity side of the court."

If the bill avers anything with certainty, it is that both the will and heirship of the complainant are and have been for years at rest on the solid basis of *res adjudicata*, and can no longer be matter of contention; that under the guidance of the court, she has been conducted into full possession of her inheritance, and her life freed from all further possible animadversion concerning her origin or legitimacy. Equity would seem to have dealt out to her its entire arsenal of remedies before she filed the present bill.

A further reason given is: "*It is a bill of discovery as to the means which have been employed by the defendant throughout this long period, to prevent and hinder the complainant from recovering possession of this real property.*"

As the entire structure of the bill rests upon the undisputed averment, that she was in *full possession of all* the estate of Clark, claimed by her long before the bill was filed, it is extremely difficult to comprehend any right to discovery relating to litigation

not only finished long before the bill for further discovery is filed, but where the result of that concluded litigation was to give the complainant, in the form of undisputed final decree, all and perhaps more relief than she ever prayed for or expected. The bill does not aver any pending action at law for damages for "preventing and hindering *the complainant from recovering possession of this real property*," nor does the bill aver any intention to institute such a suit at any future time.

The text book has yet to be written, and the case yet to be decided, that can stand as a precedent or excuse for calling this a bill of discovery, of equity cognizance.

He further says: "It is a suit for an accounting as to the rents "and profits of the real property for the period of forty-five years, "which must be taken according to the laws of the State of Lou- "isiana, in which, therefore, the defendant must be charged with "rents and profits which have been or ought to have been annu- "ally received and credited with the yearly expenditures for "reclamation, improvement and taxes, and that too, with reference "to hundreds of lots of ground. It is an account, the *correct* "statement of which by the master, occupies three hundred pages, "and upon which the record shows he has been occupied for "three years." (A rather novel statement to occur in an opinion on the first and only final hearing on pleadings and proofs.)

"*It is, therefore, an account of a most complicated and ramified character, and could not be dealt with upon a trial at law, at nisi prius.*"

As the bill avers the account to be an account for *rents* and *profits* which ought to be paid over by a defendant *out of the possession* of realty, possession being during all of the time covered by the bill and account *in third persons, strangers to the parties holding title* adverse to the defendant, and in no way atorning, and between whom and the defendant there was *no privity*, the account, in such a condition of things, may well be designated an account "*of a most complicated and ramified character.*"

It is in the horn books of equity, that chancery does not deal with unilateral accounts or state account of moneys never in fact or in contemplation of law received by the alleged debtor, or charge a defendant with the revenues of real estate held in adverse posses-

sion *quoad* the defendant by strangers, particularly where it is alleged and decreed that such adverse possession was *mala fides*, and gives rise to no claim for betterments or improvements.

The defendant being *out of possession* it, is hard to comprehend how there could be items of credit for improvements made by strangers, or for the adjustment of taxes paid, when the defendant, a corporation, *collects* and does not *pay* taxes, and all taxes paid were by strangers not parties to the litigation.

It is indeed difficult to comprehend how in an account for rents and profits on realty *out of possession* of the defendant, there can be any "charging and discharging the items," or how a defendant in such case can set up or establish offsets to the complainant's demand for rents, that demand being simply a fiction, an unsavory romance.

The most extraordinary argument in favor of equity cognizance of the matter set up in the bill, is the last in order of the reasons given.

"But there is another distinct ground of equity jurisdiction here. The complainant has recovered judgment against *several hundred actual tenants* for rents and profits for varying portions of this long period; these tenants are insolvent. The defendant in this action is the warrantor of all these *tenants*, and whatever they owe the complainant, the defendant owes to them. The defendant is not only a warrantor who has enriched herself by purchasing in bad faith the complainant's property and selling it" (*to tenants*) "at a profit of $500,000. This sum she has retained, and has had the use of since the year 1837. *The defendaut has no remedy at law upon this warranty for want of privity.* Equity, *therefore, gives her a right of action.*"

The bill and the decrees in the ejectment cases declare and find the defendants ejected, not holding as *tenants* of the City of New Orleans, but holding *adverse to both Mrs. Gaines and the City*, under claim of title in themselves. A queer sort of *tenancy* was created when the city was engaged in "selling at a profit of $500,000." A queer warranty of title is the warrant of title between a landlord and his tenant.

It is heroic equity that gives right of action where there is

no *privity* or punishes tort in punitive damages, where at law no action would lie for the same tort.

It is clear that not much aid in dissecting the bill can be derived from the opinion, upon which the decree is based.

The bill is so inartificially drawn that it is difficult to determine exactly what was intended to be set up or made the basis of supposed equity jurisdiction or ground of relief.

The bill is not single but multiple in character. Giving all reasonable intendment in favor of the pleader, the most that can be made of the paper is, after the useless recital of legitimacy and heirship, with universal legateeship under the will of 1813, set up by way of inducement, this bill avers the former litigation with adverse possession of the Clark estate. The former litigation with the City of New Orleans concerning the "Blanc tract"; the complainant's former recovery against the city in the case No. 2695. This record being made part of the bill there is no ambiguity as to the range of that bill and decree. It was to recover *all* of the "Blanc tract" ever purchased from Blanc, coming from the succession of Clark, and for an account of *all* profits, etc., from the moment of the transfer from Blanc to the city, down to the final decree for possession. The decree set up is a decree for *all* of the property in the Blanc tract, held by the city at the date of filing the bill in No. 2695.

The record shows full recovery both of possession and profits and satisfaction of decree before the present bill was filed. The bill further shows that since 1836 the city has been *out of possession* of all of the property except that recovered from her in the former suit 2695. That because the city parted with possession in 1836, the complainant was compelled to institute suit against the parties in possession (the Monsseaux and Agnelly bills): that in these bills she has recovered possession of *all* of the balance of the "Blanc tract" not recovered in suit No. 2695, and has obtained decrees for profits from the evicted, for their term of occupancy in same cases; and in other cases the master's report is in, unex-

cepted to, and in due course will pass into final decree against each of them, is made part of the bill.

The purpose and object of the bill is to obtain a decree declaring the city the *trustee* of complainant, responsible to her for all of the profits, revenues, etc., which were or ought to have been obtained and received by all of the holders of the property since the sales in 1836, when the city parted with possession, down to the commencement of the period when her decrees for profit commenced in the case of the parties found in possession by the Agnelly and Monsseaux bills, and that the city be compelled to pay all of the decrees for money rendered against the defendants in Agnelly and Monsseaux cases, with interest on the entire amount of decrees and putative profits of unknown holders, intermediate between the city and the defendants found in possession.

"*That the final judgments in suits Nos. 2695, 3665, 6085, as to each and every issue of law and fact adjudged therein, be held as res adjudicata, and as things finally adjudged against the defendant, the City of New Orleans.*"

The bill is apparently framed to obtain this [redacted] relief and decree, upon the theory that equity would compel this result. and inflict this penalty for the following reasons set out in the bill:

1st. Because while the city held title under conveyance from Evariste Blanc, while the probate of the will of 1811 was still unrevoked, the possession was in bad faith, and up to the date of the auction sales the city was naked possessor without title, a tort feasor in possession.

2d. Because the First Municipality, being in wrongful possession in 1836, platted the land into blocks and lots, and sold and delivered to third possessors, who took and held possession in bad faith, knowing they had no title, and knowing that Myra Clark Gaines was the true owner.

3d. Because the city "fraudulently" received large sums of money from the alleged sale of lots and blocks in the "Blanc tract"; this alleged fraud in receiving money for lots sold, is not averred or shown to have been a fraud upon the complainant, but

presumably a fraud upon the vendees at the sale, who are strangers to the complainant.

4th. Because the city, by a condition in its deed of conveyance to the vendees, incorporated a clause warranting the vendees in title, a convention between the city and strangers to the complainant, in which she has no concern.

5th. Because being the warrantor of the vendees when some of the assignees of these vendees were attacked by the bills of complainant, they claiming subrogation of the supposed warranty clause in the deed to the city's vendees, desired to call the city in warranty to defend the title by the rules and proceedings in the tribunal into which the complainant had forced the defendants, the call in warranty could not be entertained: although, if she had sued in law it probably could have been entertained, if there was no trouble about *ratione persona* jurisdiction between a Louisiana municipal corporation and citizens of Louisiana. That the city from this fact avoided judgment against it, not in favor of the complainant, but in favor of the defendant called into court by her bill, in which judgment she would have had no legal interest.

6th. Because in the answer to the former bill against the city (2695), the city had set up in its answer that the complainant was an adulterous bastard when she had *res adjudicata* legitimacy in virtue of the decree in *Gaines vs. Hennen*, and thereby wounded her feelings, is the inference.

7th. Because the solicitors who had represented and appeared for some of the defendants in the Agnelly and Monsseaux cases being employed and paid by the city with the understanding that they should protect the interest of the city, and resisted the recognition of the right of complainant to recover possession and rents and revenues in these suits, when the Justice of the Supreme Court, who read the opinion in the case of Gaines vs. New Orleans, had said he hoped there would be no more litigation concerning the estate of Clark.

8th. Because the defendants in the Monsseaux and Agnelly cases recognized her rights, and did not desire to litigate with her,

and petitioned the city to buy off Mrs. Gaines; but "*The City of New Orleans refused to comply with said memorial, as in equity and good conscience she should have done, and by divers machinations and acts of deception towards said memorialists, attempted to persuade them, that notwithstanding rendered in favor of complainant against said city, a successful defence could be made by them in said suits Nos. 3663, 6085, and at other times by threats and intimidation declaring that unless said memorialists resisted the claim of your oratrix, and plead such defences and resorted to such means as said solicitors selected by said city, and acting as solicitors for said defendants should suggest.*

They, the said defendants though holding with full warranty and subrogation from said city possession and title to said property, would lose and forfeit their rights and action of warranty against the City of New Orleans, and further give them to understand that should judgment be rendered adverse to them, the city would, as in law and equity bound, save them harmless by immediate settlement and payment of said judgments *to your oratrix.*"

This is given *in extenso* for the reason that it is incredible that any such stuff should find its way into a bill, or that the complainant should suppose herself the champion of the wrongs of others.

9th. Because the City of New Orleans was a party to and encouraged others to join in the suit of Fuentes vs. Gaines to procure the recall of the *ex parte* probate of the pretended will of 1813, and called and tried to prove her an adulterous bastard, and because that suit was used to delay and embarrass her in the prosecution of the Monsseaux and Agnelly suits.

10th. Because she believes that, but for the City of New Orleans, its various councilmen, mayor, etc., she would have had no litigation, since the decision of Gaines vs. Hennen by the Supreme Court in 1860.

11th. Because since the final adjudication in the Monsseaux and Agnelly suits, the defendants have demanded that the city step forward and pay the defendants all of the money received as the price of land at the auction sale "*for the use and benefit of your oratrix, and to settle and pay to your oratrix the respective judgments which on account of fruits and revenues the value for use have been or may be rendered against them,*" and the city has failed and neglected to do so.

12th. That the defendants in the Monsseaux and Agnelly cases are poor and cannot pay the "judgments," except the city

pays up to its obligation as alleged warrantor. That as to the unknown holders between the possession of the city, yielded in 1827, and the period when the present evicted defendants took possession. she does not know who they were, but believes they are dead, absent from the state, or insolvent,

13th. An averment in ambiguous terms of the acquisition by the complainant of a right of action against the city, growing out of the supposed warranty clause in the chain of conveyance from the estate of Clark, through the city, to the evicted defendants in the ejectment bills. As this pretended condition of things if true indicated the conventional transfer of a chose in action recoverable only at law, and tended to disturb the jurisdiction of the court even in proceedings at law, based upon pretended subrogation, it was not urged, and practically passed out of the bill as any ground of equitable cognizance or recovery.

Assuming, for the purpose of argument, that the so-called bill is intended as a bill for accounting, the bill does not disclose an account to be taken of which equity ever claimed cognizance. The conditions under which equity will compel and state accounts, is so admirably stated in the elaborate opinion in *Root vs. The Railroad*, 105 U. S. 189, that it seems idle to discuss further the proposition that equity will not deal with punitive damages, or state an account of moneys never received, rents never paid; compel an account of conjectural profits that *might have accrued* from the possession of realty if it had been in the possession of the defendant, but which was really out of *the defendant's possession*, or compel accounting for rents on a bill asking no information or equitable relief, and where it is pretended to have discovery as a feature, ask for the discovery of nothing not a matter of public record either in the municipal records of the City of New Orleans, the offices of notaries, or the mortgage and conveyance offices, all made public records by law, and open to the inspection of all persons.

The question whether the defendants could become the trustee of the complainant as to either the property purchased by the

city from Evariste Blanc, or as to the portion of the property afterwards sold at auction after division into lots and blocks, was settled in this cause by the decree in the former suit against the city (2695), for the reasons most admirably stated by Justice Bradley in settling that decree, and reported in 1st Woods Rep. 57, where it was held, on an issue provoked by the complainant appearing in *propria persona*, that "Where a party is in the possession of lands, claiming under an adverse but defective title, without any fraud of himself or his grantors, he *cannot* be held to be the trustee of the party holding the true title, nor if he has sold the lands made to account for the proceeds of the sale to the true owner." The question of trusteeship or springing trust is forever settled in this case by final decree in all respects *res adjudicata*. The bill then stands as simply a bill for account of rents and profits of land not in the possession of the defendant, rents and profits which never did and never could accrue to the defendant if all of the allegations of the bill are true, but purely conjectural profits, which, it is not averred, ever accrued to any person "which *might have accrued*" to persons, some known, others unknown, none of them parties to the bill, and between whom and the defendant asked to account, there was no privity either by convention or by operation of law. An account where the City of New Orleans, being out of possession, cannot claim offsets for betterments made by others, or claim credit for taxes paid into its treasury by others, in no respect a disbursement by the city. An account which, if accounting is to be made, is in all respects a *unilateral account*.

The bill makes no case for account.

This court long since laid down the conditions under which equity will compel account.

In Towle vs. Laurason, 7 Pet. 495, the bill was for an account of rent of a warehouse. Against the demand for rent, was an offset of goods sold and delivered. The court held that the remedy was at law, and dismissed the bill, no discovery or injunction being necessary as part of the remedy.

In *Root vs. Railroad, 105 U. S. 189*, the court held that equity will not take jurisdiction of a bill against the infringer of a patent, where profits and damages alone is asked. That equity could not transform an infringer into a trustee.

In *Ellis vs. Davis, 109 U. S. 485*, it was held that an heir at law cannot maintain a suit in equity to recover real estate held by the defendant under a deed from the plaintiff's ancestor, alleged to have been obtained by undue influence, although the bill prayed for an account of rents and profits: holding that an action at law would afford adequate remedy.

In *Hipp vs. Babin, 19 How. 271*, the court held that a bill will not lie where the complainant seeks to enforce a merely legal title to land. In the case at bar both title and possession are beyond controversy, where in the plaintiff, when the bill was filed, there was not only adjudicated *right to possession*, but actual possession in the plaintiff.

In Hipp vs. Babin, the court declared:

"But when a party has the right to possession which he can enforce at law, his right to rents and profits is also a legal right and must be enforced in the same jurisdiction. The instance where bills for an account of rents and profits have been maintained are those in which special grounds have been stated to show that courts of law could not give a plain, adequate and complete remedy. No instances exist where a person who had been successful at law has been allowed to file a bill for an account of rents and profits during the tortious possession held against him or in which the complexity of the account has afforded a motive for the interposition of a court of chancery to decide the title and adjust the account (*Dormer vs. Fortesque, 3 Atk. 124; Barnewell vs. Barnewell, Rid. P. C. 24*)."

In the case at bar there was no title to decide: it had been decided in another action. The account of rents and profits, not of a tortious possessor, but an avowed punishment for adverse possession by strangers. If there was any action at law for the recovery of these alleged profits, the same plaintiff would be plaintiff, and the same defendant the defendant in a suit at law; there was no avoidance of multiplicity of suits by going into equity. If the defendant was bound to pay and discharge the decree against the

defendants in the Agnelly and Monsseaux ejectment bills, the liability was a *legal liability.* The amount to be paid, if paid at all, was the amount of the aggregate decrees. The amount of each separate decree was liquidated in the most solemn form of liquidation, the *unappealed decree of a court* concerning which there could be no further controversy.

The expense of a suit at law could not reach more than a small fraction of the sum demanded as fee by the master who stated this wonderful account or the expense of printing this record.

The cases of Hipp vs. Babin and *Root vs. The Railroad,* are cited with approval in Ellis vs. Davis, 109 U. S. 486.

In *Gaines vs. Miller,* 111 U. S. 3951, this same complainant filed one of her stereotype bills against Miller to obtain a money decree for money belonging to the succession of Clark; the bill was dismissed for want of equity, there being remedy at law plain and adequate.

In Von Weel vs. Wooston, 115 U. S. 228, the doctrine is laid down that unless the transactions set forth in the bill constitute in equity a fraud or breach of trust for which the court can give relief in reinstating parties as near as may be in their condition before the alleged fraud, there is no equity jurisdiction; that mere charges that the acts set forth in the bill are fraudulent, is not sufficient ground for equity cognizance.

The settled doctrine both in this country and England is, that equity will not entertain an ejectment bill by reason of an account of rents and profits to be taken, but once having acquired jurisdiction on other grounds, will compel accounting as an *incident,* and as necessary to grant full relief, and in such case it does not matter of what character the account may be, although there is a strong conviction at the bar that equity is without power to state an account of profits not earned or accrued, on the ground that the evicted defendant ought to pay for imprudence in possession by being *condemned* to pay profits which the court is under the impression he ought to have realized. This seems too much

like punishment and forfeiture to be decreed in equity; if such excess of real revenue can be adjudged to the plaintiff in ejectment where the defendant claimed and has title. and there is no privity creating a trust, express or implied, the account comes to the plaintiff as a punishment of the defendant for negligence: *clearly a naked tort.*

In support of the demurrer for want of equity, we cite as further authorities from the reports of this court, in support of the doctrine that equity will not take jurisdiction where there is remedy at law, *United States vs. Wilson, 6 Sup. Reporter, 991; Killian vs. Ebbinhaus, 110 U. S. 568; Fussell vs. Gregg, 113 U. S. 550; Francis vs. Flinn, 6 Reporter, 1148.*

Equity will not deal with an account, simply because it is complicated, to sustain a bill for an account; there must be mutual demands, not a single matter, but a series of transactions on one side and payments on the other.

Porter vs. Spencer, 2 Johns. Ch. 179.

Badger vs. McNamara, 123 Mass. 117.

Walker vs. Brooks, 125 Mass. 941.

Ball vs. Carew, 13 Pick. 28.

Story Eq. Jur. 458, 459.

The English authorities, where there is no statute limiting equity, as in this country, show that the rule in matters of account is the same; that there must be mutual demands to give equity cognizance—dower, cases of trust, stewardship, excepted.

Dinwiddie vs. Bailey, 6 Ves. 141.

Cooper vs. Hatton, 12 Price, 502.

If the plaintiff has legal right to possession of realty, he cannot proceed by bill for account of rents and profits.

Barnewell vs. Barnewell, 3 Riely P. C. 66.

Parrot vs. Palmer, M. Y. & K. 632.

(In this case the apparent exception of mines from the general rule is commented on. Mines were at one time excepted from the general rule of accounting for rents and profits for use of realty, on the ground that mines differ from ordinary realty in the

fact that mining is nearer commerce than the ordinary use of real estate.)

Bailey vs. Taylor, 1 Russ. & M. 73; Taml. 295; L. & J. Ch. 49.

Ambrose vs. Dunmow, 9 Beat. 508.

Padwick vs. Stanley, 9 Hare, 627.

16 Jur. 586.

King vs. Barrett, 2 Y. & J. 33.

Hemings vs. Pugh, 4 Giff. 456.

12 W. R. 44; 9 L. T. N. S. 292.

A bill will not lie for mere money demand, which can be perfectly well ascertained at law.

Barry vs. Stephens, 31 L. J. Ch. 785.

Smith vs. Leveaux, 12 W. R. 31.

9 L. T. N. S. 13.

Holmes vs. Eastern Counties R. R. Co., 3 Kay & J. 675.

Abergstwith R. R. Co., R. Piercy.

10 L. T. N. S. 778.

Darthey vs. Clements, 6 Beat. 165

O. Mahony vs. Dickson, 2 Sch. & Lef. 400.

Complication of accounts, where the receipts or items are all on one side, if ever sufficient ground for intervention of equity, must show a very strong case of entanglement.

Padwick vs. Stanley, 9 Hare, 627.

16 Jur. 586.

Foley vs. Hill, 1 Ph. 399.

13 L. J. N. S.

Frietas vs. De Santos, 1 Y. J. 574.

Where there is an effort to give equity jurisdiction by a general charge that accounts were intricate, and cannot be taken without the aid of equity, the bill must disclose circumstances and facts showing the intricacy of the account, or the bill will be dismissed.

Bowles vs. Orr, 1 Y. & Cole, 464.

Padwick vs. Hurst, 18 Beat. 575.
18 Jur. 763.
Norris vs. Day, 4 Y. & Cole Ex. Eq. 475; 10 L. J. N. S. 43.
Jones vs. Munnd, 3 Y. & Cole, 347.
Phillips vs. Phillips, 9 Hare, 471.
Glenie vs. Imri, 3 Y. & Cole, 432.
Welchman vs. Farebrother, 1 Jur. N. S. 126.
Fluker vs. Taylor, 3 Drew, 183.
Ranger vs. Great Western R. R. Co. 5 H. L. Ca., 72.
Blythe vs. Whiffin, 27 L. T. N. S. 330.

It is idle to cite more authority on a question that has been settled on both sides of the Atlantic for three-quarters of a century.

There is no doubt that the law in England permits the chancery court, once having acquired jurisdiction of a controversy by reason of right to injunction or other equitable relief, to proceed to final disposition of a certain class of cases, even though part of the relief granted would be properly sought for and granted by a court of law.

With the constitutional right to trial by jury, and the statutory prohibition against resorting to equity where there is plain-adequate remedy at law, as they exist in this country, it would seem that the courts in this country have adopted this rule to a greater extent than should have been done: as for instance where the rule of recovery of rents and profits is that the recovery may be for both *actual rents and profits* actually received, and on the charge of negligence or unproduced *conjectural profits*, while an equity court *might have* cognizance as to the pretended actual profits or rents. It is doubtful if there ever was jurisdiction of the question of conjectural profits lost by negligence and tort sounding simply in damages. A prudent chancellor would at least send that issue to a court of law to be tried, and if he decreed at all, would decree upon the verdict of a jury.

The bill in this case was argued in the Circuit Court, and stated in the opinion of the district judge to be in part a bill for

discovery. There have been many rumors as to who drew the bill; while this question may never be settled, the bill on its face establishes that whoever was the author, he did not know the frame, purpose, or office of a bill of discovery.

It is clear that the pleader did not know that a bill for discovery is not a bill for relief, and that ordinarily if a plaintiff seeks in the same bill discovery and relief, the bill will be held bad for both, on general demurrer; and that the course adopted in this country of entertaining the entire case if discovery is shown to be proper, is at variance with the current of English authorities, and is in this country subject to conditions and limitations, one of which is, that the relief indicated as proper by discovery, must be of such character as a court of equity can deal with and grant relief.

It is difficult to comprehend how there can be in the chancery courts of the United States a decree for unreal conjectural profits in the way of punishment, without sending the question of the quantum of conjectural punitive profits to a court of law, as an issue, where the defendant may have the verdict of a jury, and the decree in equity be based upon the finding of the jury certified back. Doubtless a prudent chancellor would take this cause in reasonable anxiety to preserve to the defendant his constitutional right to have the issue settled by a jury.

But, assuming that the doctrine of entertaining the entire case, if there be anything of equity in any part of the bill to have been adopted and rightfully in force in this country to the fullest extent ever practised in the English courts, the bill in this case discloses no feature of equity, either in statement or prayer, upon which equity cognizance of other matters or relief can hang.

1 *Story Eq. Jur. Ed.* 1879, ¶ 71, 72.

The rule, as it is in England, is well stated in *Mitchell vs. Green*, 10 *Met.* 101, and *Story Eq. Pl.* ¶ 312, 545; *Pease vs. Pease*, 10 *Met.* 395; *Pool vs. Lloyd*, 5 *Met.* 525; *Ahrend vs. Adierne*, 118 *Mass.* 261; *Walker vs. Brooks*, 125 *Mass.* 241; *Haskins vs. Barr*, 106 *Mass.* 48.

The doctrine being that a bill cannot be maintained for discovery if it cannot be maintained for relief, unless the bill shows that the discovery is in aid of a suit at law, or the defence of a suit at law, either actually brought or about to be brought.

This court, in an early case, *Brown vs. Swan*, 10 *Pet.* 497, laid down the conditions under which a complainant could invoke equity for discovery. declaring that it is indispensable that the bill shall show:

1st. That a court of common law cannot compel the testimony sought after to be given or produced.

2d. That there are no witnesses to prove the facts sought to be wrung from the conscience of the defendant.

3d. The complainant must charge in his bill that the facts are known to the defendant, and ought to be disclosed by him; that the defendant is unable to prove the facts by other testimony and show for what purpose discovery is wanted.

If the bill in the case was not leveled at a single defendant, and that a municipal corporation, incapable of discovery on oath, and from whom discovery could in no case be had, it would still be wanting in all of these essential requirements of a bill for discovery.

It is idle, however, to discuss the internal deformities of the bill, when in form, and from the character of the defendant, and the prayer, it was never intended or framed as a bill for discovery.

The defendant is a municipal corporation, incapable of answering any bill under oath. Lawyers, familiar with remedies in equity, when they frame bills against corporations only possessed of juridical life, make some agent or officer of the defendant corporation, a defendant in the bill for the purpose of discovery, being careful to charge that such officer or agent *is possessed of the information desired*, and ought to make disclosure that the complainant is in peril, or remediless, if such disclosure is not made.

When the bill in this case was framed, it must have been apparent to the pleader that in the constant succession of municipal officers, no man could as an officer know more of the past

transactions of the corporation of which he was not at the time an officer, than could be secured from an examination of the *public record* of such transaction, just as open to the solicitor for complainant for all purposes of inspection and transcript, as to any officer of the corporation. That concerning when the "Blanc tract" was platted and sold, and upon what terms, the officers of the city in any discovery would be compelled to go to the offices of notaries and the conveyance office of the parish of Orleans, all public records open to inspection to all persons by express law.

As to the employment of counsel, and the pretended petitions alleged, addressed to the city, the counsel employed by the city and the petitioners could have been called as witnesses to prove all the law will allow to be disclosed. The defendants, whom it was alleged the city counsel represented on retainer by the city, are alive, or at least so appear on the face of the bill. All of them could have been called to prove their acts and relation to each other. A more wretched failure to set forth a case for discovery, cannot be found in the literature of courts.

If, however, the bill had not been so defective in parties and form, it is fatal to all pretense of being a bill for discovery, that the defendant is not required *to answer either the bill or the interrogatories under oath.*

The sole purpose of a bill for discovery is to furnish evidence which the complainant cannot reach by other means.

The remedy and bill was invented to obtain evidence for use in a court of law, in an issue at law; the bill was never necessary in a strictly equity cause, as equity courts hold such control over parties before them that they could almost order the production of papers in the possession of parties, and compel full answer to any proper bill. If the complainant charged the defendant with suppression of papers, and averred the contents, a failure to answer was a confession of both suppression and the [redacted]just and legal effect of the writing.

No equity court ever wasted its time and process to obtain

evidence, where an indictment for perjury would not lie against the defendant for a false answer.

In the case of a corporation possessed only of juridical life, without conscience to probe, and against which perjury can never lie, the courts have never entertained bills for discovery without joining some natural person as defendant.

Solicitors familiar with equity procedure and powers, when discovery is required of a corporation, knowing that the corporation cannot even answer the bill under oath, but must certify the verity of its answer under its corporate seal, make as defendant in the bill some officer, agent or person connected with the corporation who is averred to be in possession of, or have access to papers and deeds inquired of, or has personal knowledge of facts sought to be brought out by discovery. If the complainant be unable to make averment as to the person possessed of such access or information, the corporation is required to name the person to make discovery.

United States vs. Wagner, Law Rep. 2 Ch. 582.

Republic of Liberia vs. Roye, 15 Eng. Rep. (Moak) 44; 1st App. Cases, 189.

Republic of Costa Rica vs. Erlinger, Rep. (Moak) 690; 19 Eq. 33.

Republic of Peru vs. Wegusin, 20 Eq. 140; 13 Eng. Rep. (Moak) 679.

A bill for discovery will not lie to procure evidence to support demand for relief made in the same bill, unless the relief is demandable in equity; nor to support an action of defence at law, unless it appears: First, that the action at law is pending or about to brought; Second, that the action of defence is cognizable at law and not frivolous; Third, that the evidence sought to be obtained by discovery is pertinent and admissible in support of the action or defence: Fourth, that the testimony cannot be compelled by the court at law.

2 Story Eq. Jur. ¶ 1495.

Mitf. Eq. Pl. (Jeremy) 186.

Cooper Eq. Pl. Chap. 3, ¶ 3, pp. 191, 192.
Dunn vs. Coates, 1 Atk. 288.
Anon., 2 Pes. 451.
Gelston vs. Hoyt, 1 Johns. Ch. 547, 548.
(This case is elaborate in statement and conclusion.)

It is the belief of the bar familiar with equity procedure, that since the adoption of the statutes, state and federal, making interest in the result of the suit, or being a party in the record, no longer an obstacle to giving testimony, and the ample provisions by statute to compel the production of papers in any court of law, a naked bill for discovery can no longer be entertained.

The act of Congress adopting state procedure in cases at law, has made state statutory machinery for procuring discovery in cases at law a federal statute, binding on federal courts. It has been held that a bill of discovery does not lie since the adoption of this statute.

Heath vs. Erie R. R. Co., 9 Blatch. C. C. 316, states this conclusion with force: The element of inability in the law court to obtain the evidence or probe the conscience of the parties is now absolutely wanting; nor was it ever the office of equity to lend a bill for discovery, for the purpose of bringing into court, at the expense of the defendant, attested copies of public records of the conveyance office, or the public proceedings of municipal, legislative and executive departments, of which the complainant, together with all the world, has the right of inspection, and can obtain authentic copies on precisely the same terms as the defendant or any other person with or without interest.

We feel that an apology is due the court for treating as serious, the question whether the Circuit Court ever acquired jurisdiction of this case in virtue of discovery asked, demanded or demandable. The assumption that the bill has any feature of a bill for discovery, is, we admit, too absurd for serious consideration. The only apology we can offer, is, that the matter was argued in the circuit without avail, and the monstrous decree

appealed from, has no color of legality even in form, unless the bill can be tortured into a bill for discovery, as no injunction was asked, and no case for injunction attempted to be made in the bill.

If, for purpose of argument, it is admitted that the matters we have so far urged against the bill are not fatal to the assumption that there is equity cognizance of the matters set out in the bill, the demurrer should have been sustained: because the complainant, *quoad* all matters of controversy with the City of New Orleans concerning the title to the lands purchased by the city from Evariste Blanc, coming from the succession of Clark, has had her day in court, and all matters which were or ought to have been adjudicated, have been adjudicated in her former bill against the city, the bill in No. 2695.

This question was fairly raised by the bill, the record in 2695 being made a part of the bill, and should have been disposed of on demurrer and the bill dismissed; but as the bill was not dismissed, but went to some kind of final hearing to save further consideration, the question of *res adjudicata* will be considered not only on the bill as it stood at the time of the trial of the demurrer, but on the case as it stood at the time of final decree, and stands now: that is, not only on the bill, but upon the bill, plea, answer, replication and proofs.

There can be no dispute as to the rule of estoppel by judgment and decree: it is too well settled.

Res adjudicata bears at least upon parties and those privy to the immediate parties, and restrains them from litigating anew such matters as have been previously drawn into controversy between them or those representing them, and have been authoritatively settled by a competent court. This is undoubtedly the correct statement of all judgments *in personam.*

The rule as laid down in *Packet Co. vs. Sickles*, 6 *Wall.* 592, has been followed by this court to the extent of allowing parol evidence concerning matters actually litigated in a former suit,

where it did not apparently appear by the record, as is often uncertain in the record of a common law case exactly what was litigated; holding, that the plea *res adjudicata* applies to every point which was open to the party within the legitimate scope of the pleadings in the record, and every point which might have been litigated in the action under the pleadings.

This is the rule both in common law and civil law.

Hopkins vs. Lee, 6 Wheat. 109.
U. S. Bank vs. Beverly, 1 How. 134.
Chapman vs. Smith, 16 How. 114.
Thompson vs. Roberts, 24 How. 233.
Campbell vs. Rankin, 99 U. S. 261.
Baird vs. U. S., 96 U. S. 430.
Ancora vs. West, 7 Wall. 82.
The Appollon, 9 Wheat. 362.
Durant vs. Essex Co., 7 Wall. 107.
Nashville R. R. Co. vs. U. S., 113 *U. S.* [redacted] 261.
Hebburn vs. Dunlap, 1 Wheat. 179.
Ballance vs. Forsyth, 24 How. 183.
Beloit vs. Morgan, 7 Wall. 619.
Gould vs. Evansville, etc. R. R. Co., 91 U. S. 526.
Tioga R. R. Co. vs. R. R. Co., 20 Wall. 137.
Montgomery vs. Samory, 99 U. S. 482.
Block vs. County Commissioners, 99 U. S. 686.
Louis vs. Brown Lownship, 109 U. S. 162.
Pollard vs. R. R. Co., 101 U. S. 223.
Mason Sumter Co. vs. Butchtel, 101 U. S. 638.
Case vs. Beauregard, 101 U. S. 688.
Stout vs. Lye, 101 U. S. 66.
Whiteside vs. Hazelton, 101 U. S. 296.
Corcoran Canal Co., 94 U. S. 741.

In determining whether the demurrer on the ground of *res adjudicata* should have been allowed, or the plea *res adjudicata* in the answer sustained on final hearing by reason of the former decree on the bill in 2695, it is necessary to determine whether

the prior suit was between the same parties, standing in the same capacity; whether the former suit had the same object, and related to the same matter in issue in the pending bill.

The complete record in *Gaines vs. New Orleans*, set up as *res adjudicata*, is here in transcript, pleadings and evidence. A simple inspection of the record ought to settle all of the questions either in the affirmative or negative.

The record settles the question in the affirmative most unqualifiedly. No better illustration of a case possessing *all* of the conditions necessary for estoppel by judgment could be invented as illustration.

The plaintiff in No. 2695 is the plaintiff here. The character or capacity in which she sues is stated in both bills, in almost identical verbiage.

The portion of the bill in the pending case, in which the capacity of the plaintiff and the source of her title are set forth, was evidently copied from the bill in 2695. In both bills she claimed as legitimate child and universal legatee under the pretended will of 1813. The land claimed in both bills is the same; in the bill in 2695, the land claimed of the City of New Orleans, defendants in both bills, is described as the first lot of the five lots described in the bill.

The bill charges:

"That the said lots and parcels of land, as above numbered "and described, are now in the possession of, and held and claimed "by the said defendants in the following manner, to-wit:"

"1. The following is the text of the description of 'Lot "No. 1.'"

"1. 'A certain tract, lot or parcel of ground, with all of the "buildings, rights, ways and improvements thereon, of an irregu- "lar form, having about eleven arpents fronting on the Bayou St. "John, and bounded by the said bayou, the Canal Carondelet, "the road called Bayou Road and D'Orgenois street, containing "altogether about two hundred and forty superficial arpents."

(*Rec. Vol.* 6, 6191, 6192.)

The bill in 2695 charges that the city claims title from Evariste Blanc, who purchased from Relf and Chew, executors under

the probated will of 1811, who acted as attorneys in fact of Mary Clark, universal legatee under the will of 1811.

The bill in the present case describes the land claimed as the same land claimed in suit No. 122 and in the bill in No. 2695, and makes the latter bill a part of the present bill "for certainty": declares that the city claims title by the same chain of title from Relf and Chew, as executors under the will of 1811, or as attorneys in fact of Mary Clark, the legatee, and by repeated reiteration declared it to be the same land sued for in both No. 122 and No. 2695; and avers that by the decree of the Supreme Court in bill No. 2695, the title of the city was held bad; that complainant was decreed possession of all of the land found in the possession of the city when the bill in No. 2695 was filed.

The parties were the same; the lands sought to be dealt with the same in both bills.

The next inquiry is, what was the dispute, and what was tried, or ought to have been tried in 2695, the former suit.

The bill in No. 2695 was an ejectment bill, not directly cognizable in equity, but held in equity, and the defendant deprived of jury trial, because, it is said, that this course avoided multiplicity of suits, and being cognizable in equity, for that reason equity drew to itself capacity to not only decree possession, but compel account of rents, revenues and profits.

The bill in 2695 was drawn in accord with that theory. It avers that the defendant, the City of New Orleans, had from the date of the conveyance to the city from Evariste Blanc, in 1834, received rents, profits and revenues, the exact amount of which complainant was ignorant, and demanded discovery of the said amount. The prayer was for delivery of possession; that the defendant be decreed to have held the land as the trustee of the complainant, and deliver up to her "the rents and revenues thereof, and that an account be taken of the said rents and revenues from the time the said property was taken possession of by said defendants, with interest; and that said defendants be decreed to pay the same to your oratrix." The matter at issue then, and the

matter tried, or which ought to have been tried, was as broad as any possible controversy between an owner of legal title and a disseizor. The question of title and possession, and the amount of compensation due from the disseizor by reason of wrongful adverse possession, were up for arbitrament.

The bill in the case on appeal, avers that as the plaintiff in No. 2695, the complainant recovered all of the land found in the possession of the defendant, when the bill was filed, and all of the rents, revenues and profits found to be due her by the master for the wrongful adverse possession of the defendant. That she had both branches of relief prayed for, and that relief came in the form of a final decree in the case in equity, was to support an action or defence at law, pray to be again put in possession of property decreed to her in 2695, but averring in substance that by reason of the blunder of not bringing her ejectment bill against the actual possessors at first, she was compelled to bring the Agnelly and Monsseaux bills, and that these bills have passed to final decree; she prays that the city be compelled to pay these decrees, "*and* "*that said defendant may be decreed to make full discovery of the* "*matters and things herein set forth, and come to an account with* "*your oratrix*, to be taken by and under the direction of this "Honorable Court, of the fruits, revenues, profits and value for "the use of said property since the 21st September, 1834, and to "pay over to your oratrix whatever shall be found due by said "defendant upon the taking of said account, and that said ac- "count include, not only the amounts of fruits and revenues and "value for use actually derived and received from said property "but likewise such fruits, revenues and value for use as could "have been derived from the same by ordinary good manage- "ment had she been left in the quiet possession of said property; "and further, that said account include the fruits, revenues and "value for the use of said property during the period from said "21st September, 1834, to the said respective dates when the said "City of New Orleans and the First Municipality passed said "illegal acts of sale of portions of the same to other parties, as "also the fruits, revenues and value for use of said property from "the dates of said respective sales to said other parties, pretended "purchasers, who then *and thereby took possession of respective* "*portions thereof*, by the will, desire, consent and fraudulent "acts of said City of New Orleans and First Municipality *up to* "*the time and times when said respective purchasers or their vendees* "*surrendered, or shall surrender the possession of the same to your*

" *oratrix;* and that said City of New Orleans be held and decreed " bound and indebted for the same *in solido* with said *respective* " *other and subsequent purchasers.*" (Rec. Vol. 1, 13).

The bill, as matter of detail, or suggestion to the court, further prayed that in taking the account the "judgments" in the ejectment bills against Monsseaux and Agnelly be taken in so far as damages decreed to be the true amount due from the city, for the period of occupancy of the last holders found in possession.

It is idle to enlarge on the self-evident proposition that both bills pray for the same relief, as far as accounting is concerned, or that if the dishonest measure of demand in accounting, set up in the bill on appeal, was ever the measure of complainant's right to recover, it was the measure when the former bill in No. 2695 was filed and decreed upon; for that bill was for *all of the land*, and *all* of the fruits and revenues and "value for use," whatever that phrase may mean, which the complainant was entitled to have or receive from the city by reason of the purchase of the "Blanc tract" from Evariste Blanc, in 1834, and its subsequent platting into lots, and sale at auction. This court in that case held the city to be holder in bad faith, and subject to all the damages and liabilities attaching to bad faith possessorship of realty under the law of Louisiana. The Circuit Court decreed in that form, and has adhered to that view at all times since, and has enlarged the law of Louisiana in that particular, until it is no longer recognizable by the bar. The law, as administered by the Circuit Court, is the same now as it was when application was made for decree under the mandate of this court in *Gaines vs. New Orleans*, this celebrated case No. 2695.

The demand of Mrs. Gaines for real and putative profits, for the period when the city was *in possession*, and for actual and putative profits and damages while the city was *out of possession*, and possession was held adverse both to the city and Mrs. Gaines, if ever a demand against or liability of the City of New Orleans was in full force, as a demand when the bill in No. 2695 was filed and decreed upon, and was or ought to have been litigated and adjudged in that bill and in that decree.

If, at the time decree was passed at the circuit, on the mandate of this court, Mrs. Gaines was not in possession of all of the property acquired by the city from Blanc, the bill in that case should have been kept open until there was possession, when the account could have been closed under this extraordinary system of accounting. The decree on the mandate passed in the Circuit Court was framed in the usual form, and did leave the case open for the consideration of all relief for which the complainant might importune.

The decree is made an exhibit to the bill here on appeal, and is given *in extenso* on page 17 of the printed record.

It cannot be disputed that the parties, the land and relief, in so far as the pending bill asks relief, were the same in both bills, and that the parties stood in the same capacity in the litigation in both cases, that all of the conditions requisite for *res adjudicata* exist.

While it is not a matter of discussion, what, under the pleadings and issues in No. 2695, *ought to have been* adjudged, it may be worth inquiry to ascertain what *was tried* and adjudged in that case. In the statement of the case, we have shown the steps taken to obtain a larger decree than Justices Bradley or Woods, holding the circuit, were willing to give, and how Mrs. Gaines came into court in *propria persona*, to ask what her counsel were doubtless too modest to ask, that is, for *both land and purchase price*, and that the city be held as *trustee* or agent for complainant What was asked and litigated, and what was decreed, is set out with exemplary clearness in *Gaines vs. New Orleans*, 1st *Woods Rep.* 104, where the court passed upon the application of Mrs. Gaines to expand the case, and decree trusteeship, and give her both land and the price for which the city sold the land that had passed out of its possession.

The decree rendered and accepted by the complainant, as set forth as part of the pending bill as "Exhibit B," Rec. p. 17, demonstrates that there was litigated and settled by decree:

1st. That complainant was the only legitimate child of Daniel Clark;

2d. That she was exclusively invested with the character of the only legitimate child of Clark, and as such entitled to inherit his estate;

3d. That she was the universal legatee of Clark, and entitled to all of the estate of which Clark died seized, subject to the payment of certain special legacies named in the will of 1813;

4th. That the property purchased by the city from Evariste Blanc was a part of the succession of Clark; that all conveyances in the chain of title from Relf and Chew, down to and including the conveyance to the city, were waste paper: in all things null and void, and did not alienate or affect the title of the complainant; that all of the grantors and grantees in the chain of paper title, had full notice of the absence of all title, and know the conveyance to be void, and a fraud on the rights of Myra Clark Gaines;

5th. That all of the "Blanc tract" remained undisposed of, these conveyances to the contrary notwithstanding, and stood as part and parcel of the succession of Daniel Clark, and therefore the property of the complainant;

6th. That the complainant, as legitimate and only child, and universal legatee of Clark, was justly entitled to "all the yearly rents and profits accruing from the same since the same came into the possession of the said defendant, to-wit: on the 26th of September, 1834," subject to the reservation in a subsequent portion of the decree, "to be made according to the laws of Louisiana," and that a master be appointed to take the account;

7th. That the city, at the time of filing the bill, was not, nor since that time had been in adverse possession of all of the land in the "Blanc tract," but had sold and disposed of all of the land, except that portion described in the decree, to-wit: the square upon which the draining machine was located, and the squares set apart as a public square;

8th. That the city deliver up to the complainant all of the land so found to be in its possession, and account for the profits of said portions so ordered to be surrendered;

9th. That John B. Weller act as master to take account of "*the yearly rents and profits of the said portion of said land now held "as aforesaid by the defendant, the city of New Orleans, from the "time said land came into the possession of said defendant on the 26th "day of September, 1834, and of all other portions of the said tract "of land set forth in said answer of defendant on exhibits thereto an-"nexed, from the 26th day of September, 1834, to the day and date, "when the defendant, the City of New Orleans, sold or disposed of the "same to other parties.*"

The decree passed upon the entire question of title and liability of the city from having purchased from Blanc, and for having held a portion or sold a portion to others. Everything that was or ought to have been adjudged, was adjudged in the most formal manner.

The proceedings for settling decree on mandate are to be tried. (Rec. Vol. 7, 7396 et seq.)

All the proceedings before the master in No. 2695 are here in transcript, leaving no mystery concerning what was litigated before the master. The report of the master, Weller, is to be found Rec. Vol. 7, p. 7406 et seq., the record, containing all of the proofs, and a full report of his proceedings, with full tables of his various estimates.

The proceedings before the master were conducted by Mrs. Gaines herself, in *propria persona*, her factotum, Wilder, doing much of the swearing. The master found, as to the property sold by the city, that the city received no rents, revenues and profits. As to the land in possession of the city as site of the draining machine and public park, he made three estimates of amount due. On exceptionto his report the court decreed the smallest estimate correct in amount, little more than $125,000. The decree was appealed from by the city and affirmed by this court.

The complainant presented all manner of demands to the master, amongst others, a claim for account *for waste*. In his report, the master stated that such demand had been made, but

that there was no proof of waste in cutting timber, as asserted.

This inquiry went back to the master again, and on May 12th, 1871, he reported on the claim, sending in the evidence with his report. This report is to be found Vol. 7, page 7493 et seq., and is a curious illustration of the facility with which Mrs. Gaines could change front when it served her interest to do so. It served her interest on the trial of the case on appeal to make out that the "Blanc tract" was at the date of its purchase in condition to be used at once for building purposes in order to swell the account of revenues that "*ought to have been received.*" In the inquiry before master Weller, she wanted damages for waste in cutting *swamp cypress timber* on the "Blanc tract," and called a number of witnesses, Wilder amongst others, to show that there were a large number of cypress trees on the land worth two dollars per tree, and timber enough in excess to make one hundred and fifty cords of wood *per acre*. Rec. Vol. 7, 493 et seq. This is an indication of what the complainant understood *could be* determined in this case No. 2695.

The complainant never appealed from the decree in this cause, although the defendant did appeal. On the afirmance of the decree rendered by the Circuit Court, the sureties paid the money into court, amounting, principal and interest, to the sum of $139,720, and it was distributed amongst lien holders as shown by the decree here in transcript (Rec. Vol. 7, p. 7541). All of the funds went to discharge obligations of the complainant.

As shown in the bill and proof in support of the plea *res adjudicata*, all of the conditions of a complete bar to the present action by estoppel by judgment exist, surrounded by all of the conditions necessary to make the bar complete as against any subsequent demand for account.

Cunningham vs. Ashley, 45 Cal. 485.
Jackson vs. Lodge, 36 Cal. 28.
Warren vs. Cummings, 6 *Cush.* 103.
Simpson vs. Hart, 1 *Johns. Ch.* 91.
Kingland vs. Spalding, 3 *Barb. Ch.* 341.

Gardner vs. Buckbee, 3 *Cow.* 120.
Burt vs. Sternberg, 4 *Cow.* 559.
Ethridge vs. Osborn, 12 *Wend.* 399.
Einbury vs. Conner, 3 *Coms.* 511.
Doty vs. Brown, 4 *Coms.* 71.
Castle vs. Noyes, 4 *Kern.* 329.
Gelson vs. Hoyt, 1 *Johns. Ch.* 543.
Hoyt vs. Gelson, 13 *Johns. Ch.* 141.
Holmes vs. Remsen, 7 *Johns. Ch.* 286.
Egleston vs. Knickerbocker, 6 *Barb.* 458.
Orgsby vs. LaFarge, 2 *Coms.* 112.
Daroue vs. Fanning, 4 *Johns. Ch.* 199.
Newcomb vs. St. Peter's Church, 2 *Sand. Ch.* 636.
O'Brien vs. Heeny, 2 *Edw.* 461.
Lansing vs. Russell, 13 *Barb.* 510.
Burhans vs. Van Zandt, 3 *Seld.* 523.
Bellinger vs. Craigne, 31 *Barb. 534.*
People vs. Supervisors, 27 *Cal.* 675.
Stewart vs. Stebbins, 30 *Miss.* 81.
Barker vs. Cleveland, 19 *Mich.* 235.
Hooker vs. Hubbard, 102 *Mass.* 242.
White vs. Simonds, 33 *Vt.* 180.
Day vs. Valette, 25 *Jud.* 43.

If it be claimed, in support of the present bill, that the decree for account in the former bill against the city was only for a *part* of the amount due Mrs. Gaines, and that the decree prayed for in the bill on appeal was simply to supplement the inadequate remedy granted under the former bill, the answer is, that the former bill, in so far as it granted any affirmative relief on final decree, was a *case at law* administered in equity, not by reason of any direct equity cognizance of the matter decreed, but by reason of incidental matters, to avoid multiplicity of suits being the chief alleged ground of jurisdiction. The law of Louisiana was part of the law of remedy binding on the Circuit Court to the same extent as if that court had tried the case as

ejectment on petitory action on the law side. Under the statute law of Louisiana, a plaintiff cannot split up a cause of action and sue in detail or detachments. Articles 91 and 156 of the Louisiana Code of Practice have been in continuous force since 1825, long before Mrs. Gaines commenced any litigation as heir of Clark.

Article 91 relates to the jurisdiction of the court as to amount, and ends in its last paragraph : " But if one in order to " give jurisdiction to a judge, demand a sum below that which is " really due him, he shall be presumed to have remitted the ove- " plus, and after having obtained judgment for the sum he had " claimed, he shall lose all right of action for that overplus."

It may be claimed that this article is special and applies only to cases where the plaintiff has abated demand to give jurisdiction to a particular court. If this is true, still Article 156, C. P. is conclusive.

Article 156. " If one demand less than is due him, and do not amend his petition in order to augment his demand, he shall lose the overplus."

Both of these articles have received judicial construction by the Supreme Court of the state.

McCaleb vs. Estate Fluker, 14 *Ann.* 316.

Brandagee vs. Chamberlin, 2 *Rob.* 207.

Pascoen's Widow vs. Pavia, 14 *La.* 135.

It will not be disputed that this is a firmly established part of the law of remedy in Louisiana, and has been in full force and operation since 1825.

The rule as stated in La. C. P. 156, is exactly the rule that has always prevailed both in equity and common law courts.

Rockwell vs. Longley, 19 Pa. St. 508.

Smith vs. Weeks, 26 Barb. 468.

Fulton vs. Matthews, 15 Johns. 432.

Jackson vs. Colver, 16 Johns. 487.

Beckford vs. Cooper, 41 Pa. St. 146.

Logan vs. Caffrey, 30 Pa. St. 196.

Weckensham vs. Wheedon, 33 Mo. 561.

Bancroft vs. Winspear, 44 Barb. 209.
Guernsey vs. Curser, 8 Wend. 492.
Stein vs. Steamboat, 17 Ohio St. 471.
Mandeville vs. Welsh, 5 Wheat. 277.
Barksdale vs. Green, 29 Ga. 420.
Ewing vs. McNairy, 20 A. St. 321.
Walker vs. Ames, 2 Cow. 428.
Rogers vs. Higgins, 57 Ill. 247.
Stockton vs. Ford, 18 How. (U. S.) 420.

The bill on its face shows prescription of one year prescribed for *quasi offenses* by the law of Louisiana.

The final decree awarding possession and ejecting the defendants in the Monsseaux and Agnelly ejectment bills, were more than one year old when the present bill was filed, any wrongs and torts of the City of New Orleans in urging the defendants in the new bills to resist recovery if *committed* and actionable, were actionable only as wrong doing and tort. All the offenses charged against the city are charged as having been committed *before* the final decree in the ejectment bills against actual occupants of the "Blanc tract" who had not prior to these suits been sued in any form.

The pretended right of recovery set forth in the pending bill is based entirely on acts of the City of New Orleans committed *since* the purchase from Blanc, and do not in any manner affect the complainant's title. It is impossible to comprehend how, even if all the stuff crammed into the bill together, makes or states a cause of action either in equity or law, the complainant can escape the statutory prescription of one year prescribed by the Code of Louisiana as the limit of actions growing out of torts or *quasi offenses.*

The appellees seem to be in this dilemma: if the action is a second action for an account, it is barred by the former decree; if it is not an action for a second accounting, then it is to obtain a decree punishing the City of New Orleans for litigating in its own defense, and in countenancing other defendants in defending

against the suits of Mrs. Gaines, and is most certainly not cognizable in equity, because it is an action *ex delicto* sounding in damages, and was prescribed a month before the suit was commenced, as appears on the face of the complainant's pleading.

If, on the other hand, the complainant claims that there is privity in the alleged contract of warranty said to be contained in the conveyances by the city, the answer is, that demand was only cognizable at law in the hands of the original warrantees named in the contract, and if you have inherited the right of action of the warrantees, the character of action necessary to enforce the obligation did not change from law to equity by your inheriting or becoming interested as obligee, if you ever did so become interested. by the operation of law.

Equally disastrous would it have been to have insisted upon the loose statement in the bill that the defendants in the Monsseaux and Agnelly bills had *assigned* these pretended claims under the alleged warranty clause in the city conveyances: such a claim would have at once ousted the federal court of jurisdiction on the face of the record: for whatever may have been the actual residence of Mrs. Gaines, and even if it was in fact such as to warrant her in invoking the jurisdiction of the federal court in Louisiana in an ordinary personal action against the City of New Orleans, she certainly could not bring an action against the City of New Orleans on an assigned chose in action not negotiable by law merchant without pleading in some issuable form facts showing that the assignees of the chose in action could have sued in the federal court. This she never attempted, and it does not appear; the presumption is that the evicted possessors of the "Blanc tract" still have the residence incident to local holding possession of the land in the City of New Orleans.

It cannot be asserted that the bill shows any features of a bill to avoid multiplicity of actions or suits.

If there ever existed any right of action either in law or equity growing out of the stuff compressed into the bill, it always *was one action, with one complainant and one defendant*, whether

brought in law or in equity, and concerned only one parcel of ground; the division of the Blanc tract into lots and blocks is one of the "frauds" and "wrongs" charged as basis of indivisible remedy as to the entire tract.

We respectfully submit that the demurrer to the bill was well taken, and should have been maintained in the Circuit Court, and the bill dismissed as a pleading which, if it discloses any known cause of action cognizable by any court, is certainly not cognizable in equity. It seems like trifling with the court to deal with the case as if it had any possible merits, and but for the extraordinary result reached in the Circuit Court on a supposed dealing with the merits, we would rest the case on the demurrer.

The case is as lame and decrepid in fact and proofs, as it is in the pleading in the bill.

The bill should have been dismissed at the trial in the circuit, as unsustained by proof, even if the assumed law was correctly ascertained.

We will deal with some of the minor items of the bill before considering that portion of the decree which is said to deal entirely with accounting for putative profits.

The last item of decreed indebtedness named in the decree is

"the further sum of thirty-four thousand dollars ($34,000), the "amount of costs heretofore taxed against the several defendants "in the suit of Myra Clark Gaines vs. P. H. Monsseaux et als., "numbered 3663, and Myra C. Gaines vs. P. V. Agnelly et als., "numbered 6085 upon the docket of this court, the names of said "defendants being set forth in schedules or exhibits 'C1' and "'C2,' annexed to the complainant's bill of complaint, with inte-"rest at the rate of five per centum per annum till paid, from "January 10th, A. D. 1881."

The only proof of any kind relating to measure of damages produced by complainant in the entire course of the case, was the evidence before Sabourin in the premature accounting and returned by him with his report.

Objection had been made to Sabourin that he would or could use his position to attempt the collection of his costs in the two ejectment cases, allowed him as master, by making the demand a charge against the city in his pretended accounting.

Counsel for the city watched his course with extreme vigilance to detect the first appearance of any such design. No proof of any taxation of costs was produced before the master, and we can find none in all of this mass of printed records, including complete transcripts of both the Monsseaux and Agnelly record.

If the costs had never been taxed, as required by law, the record of that taxation should have been in the record of these cases.

It is undoubtedly a fact that there never was even an attempt to tax the costs in either of the causes, and for that reason no record of the taxation could be produced or was produced on the trial. If the city was to be held the debtor for this monstrous bill of costs, it had the right to regular taxation and to contest the accuracy of the taxation.

Nothing can be more clear that the even $34,000 alleged costs did not accrue under the statutory fee bill, and if there ever was any foundation for this portion of the decree, it must rest upon extraordinary allowances made on appeal to the discretion of the court in matters not enumerated in the bill. We have read and re-read the record to find proof of the amount of costs allowed and taxable against the defendants named in "C1," "C2," filed with the bill, and cannot find even the basis upon which fee bill allowances can be taxed. The item of $34,000 stands utterly without proof. If it can be chargeable to or decreed against the defendants as costs incurred in the Monsseaux and Agnelly bills, the statutes relating to taxation of costs in the federal court require the bill to be supported by affidavit. The man does not live who could swear $34,000 to be the correct and true amount of taxable costs in these cases.

But, suppose it be conceded, for the purpose of argument, that when taxed lawfully the costs in question will amount to the sum of $34,000, by what principle of law does the complainant become entitled to a decree for money, not one cent of which, in so far as the record shows, was ever *due her in fact or by the operation of law.*

The costs, if chargeable as costs, are due to the officers of the court: only such costs as were made or caused by the complainant are primarily *due from her*. The costs made by the defendants are primarily due from the defendants. The obligation to pay the entire costs is imposed upon the defendants in the ejectment bills only by the *terms of final decree*. That portion of the decree in no manner added to the assets of the complainant, but must be satisfied by the payment to others than the plaintiff, *to-wit:* the officers of the court to whom the costs are due. Those officers are the only persons who can discharge the judgment *quoad* costs, by entering satisfaction.

The conditions which must concur to give the complainant a right to recover costs, even of the defendant, beyond the statute allowance of trial docket and deposition fees, are, that the costs have been legally incurred and legally taxed; that the plaintiff has *paid and discharged all of the costs taxed*, and holds subrogation in fact or in law of the right of the officers of the court to the costs taxed.

No such showing was made nor could be truthfully made. All who knew Mrs. Gaines, knew that it was contrary to her religion to pay even her own costs if she could avoid the necessity and get official action without payment.

The decree in favor of Mrs. Gaines for costs not *due* to her, or *paid by her*, to those to whom due would, in a case of liability to pay costs apparent on the record as a charge against the defendants, or to the real parties to whom the costs were actually due, subject the defendant to liability of double recovery against him.

No showing for the recovery of this $34,000 costs is made in the bill, or attempted in the proofs.

It is idle to argue that there never could have been any liability on the part of the city to pay these costs to those to whom the costs are due, if the amount was correctly taxed, and there had been averments and proof concerning this item in the decree. The proposition is too monstrous and absurd for notice.

It is possible, if the parties claiming to have warranty

from the city were to sue on the supposed covenant and should recover, that if they had paid costs properly incurred and properly taxed, they might recover costs actually paid in defending the title, on proof that they had paid the costs. This suit is not on any covenant of warranty, nor is it by a plaintiff who could sue on the warranty of her own right and who shows no subrogation and could not show subrogation if she had it without sending her case out of the federal court even if it had been otherwise properly instituted at law, on the law side of the court.

The remaining items of the decree, $1,925,667 83, alleged profits from 1837 down to the date when the accounting against the defendants in possession commenced, and the $950,110, is said to be the aggregate total of rents and profits decreed in the Monsseaux and Agnelly ejectment bills, can be dealt with as the accounting portion of the decree covering the time from 1837 down to the date of the decree.

Even if the law is as held by the district judge on the hearing of the demurer and on final decree, the decree is wrong. If it be assumed that the city has been guilty of all of the torts stated or hinted at in the bill, the result has not been to keep the complainant out of possession from 1834 or 1837, by or through any fault of the City of New Orleans.

From 1813 until 1832 the complainant avers she was ignorant of her alleged and subsequently adjudicated parentage. This, if true, was the fault of a reticent guardian and alleged father, S. B. Davis, and a most unnatural mother, who should have disclosed to her child her real parentage and relation to Daniel Clark if she could, without involving her child in shame and bastardy, which, if true, it was a mercy to conceal. If Myra was legitimate, the act of concealment of the mother was a crime.

The city was not in fault in this act; it is not claimed that an officer of the city ever knew either of the pretended legitimacy and heirship of Myra Clark Gaines, or of the unnatural concealment by her mother.

The only evidence upon which any court has decreed the

heirship of Myra Clark Gaines has been the pretended declaration of Clark in the will of 1813, and in the institution of the alleged universal legateeship said to have been conferred in the will of 1813. That will, it is alleged in the bill, was spoliated, destroyed or concealed. This is not alleged to have been the act of the city, but was always charged by the complainant to have been the act of Relf, one of the executors under the will of 1811. For the spoliation of the will of 1813, and all of the alleged delays consequent from that act, if ever committed, the city cannot be held to be in blame.

When the city purchased the Blanc tract, the record of title stood legally correct on its face—original ownership by Clark, at the time of his death, the will of 1811 probated the universal legatee under that will, Mary Clark, in possession under the proper decree of the proper probate court. A sufficient title by conveyance from Mary Clark to Evariste Blanc, a sufficient conveyance from Blanc to the city. It is to be hoped that courts will not often be called on to decree a municipal corporation guilty of fraud and bad faith in taking such title on the faith of the opinion of the best lawyers of that day that the title was indefeasible and good.

The pretended heir, if she knew of her heirship in 1832, remained quiet, made no pretension or manifestation until 1834, when she instituted some proceedings in the probate court looking to the probate of the alleged will of 1813. This proceeding dragged on until the 8th of June, 1836, when she was non-suited in the probate court: for this fruitless two years of litigation the city was not in fault.

She took no further steps towards recovery of possession of the Blanc tract until the suit No. 122, filed July 28, 1836; in this bill she of her own fault blundered, setting up title under a will never probated. For this blunder, and the consequent delay caused in going to the Supreme Court on difference of opinion between judges on the circuit as to the power of the court to hear the cause or grant relief, and as to the form in which proceedings should be

conducted, and for the fact that her bill was dismissed in the Circuit Court after she had changed front and stood claiming one-half of the estate as assignee of her mother, and four-fifths of the balance as forced heir, and the affirmance of this decree by the Supreme Court, the city was not in fault. Nor can it be held in fault because the Supreme Court in Gaines vs. Relf held *her* to be an *adulterine bastard*, incapable of inheriting as heir or legatee.

It is record fact, beyond dispute, that until the filing of the bill in the former suit against the City of New Orleans, No. 2695, the complainant had instituted no suit under which possession of any portion of the Blanc tract could be in any event decreed to her. That bill was not filed until December 26th, 1856, more than twenty years after the effort to probate the will of 1813 had been non-suited in the probate court ("that non-suit" was in June, 1836).

By her own fault she has been litigating upon a title which she could only claim under the pretended will of 1813, with no probate and none attempted after the abortive attempt of 1834, until the successful experiment of 1856. By her own fault she kept her title in suspense, and in no form to be set up in court until 1856. This delay was her fault. When she filed the bill against the city in No. 2695, by her own blundering she undertook to recover possession of the entire Blanc tract on an ejectment bill against the City of New Orleans, not in possession of the tract at the time the bill was *filed*, but holding only a small portion as a public square and site for a draining machine. This fact was promptly disclosed to her in the answer of the city. She took no heed of her blundering, made no new parties, but went to final hearing, when her bill was dismissed on the question of her pretended title.

That this bill was dismissed was not the fault of the city, but if fault at all, was the fault of the tribunal of her own selection.

Instead of appealing from this decree when it was rendered, she apparently acquiesced in the decree for six years, and did not appeal from the decree of dismissal rendered against her bill on the 23d of April, 1858, until the 17th of June, 1865. The appeal

was not heard in this court until late in the December term, 1867; for this delay in steps taken towards recovery of the "Blanc tract" the city was not in fault. The delay was the result of the blundering of the complainant.

When the mandate of this court came back, it was no fault of the city that there was no circuit judge in the circuit, and that the district judge refused to act in the case, causing a delay in obtaining final decree until June, 1870, when an act of Congress had made a circuit judge who was present in the circuit and a justice of this court had been also assigned to the fifth circuit.

From 1832 to 1870, her effort to recover from the city that portion of the "Blanc tract" held in possession by the city, was delayed and ineffectual from the fault and blundering of the complainant, and events over which the city had no direction or control.

In the suit No. 2695, in 1870, she recovered possession of all of the Blanc tract her bill called for. She could have made all of the parties in possession defendants in that bill and obtained possession of the entire tract but for her own blundering.

After she had employed Stone as her counsel in 1863, she seems to have for the first time been advised that it was an elementary principle that ejectment only lies against the party in possession, and filed the *Monsseaux* and *Agnelly* bills under that advice. These bills were the *first* suits instituted for the recovery of that portion of the Blanc tract sold by the city in 1837, at the auction sales.

The Monsseaux bill was filed in January, 1866, nearly *thirty years* after her first bill to recover the Blanc tract, in the case No. 122, her first bill against the city, and ten years after her second bill against the city, 2695, was filed, and thirty years from the day when she alleges she first ascertained that the property was hers as the heir of Daniel Clark. (Rec. Vol. 2, p. 2204.)

The *Agnelly* bill was not filed until four years after the *Monsseaux* bill, on February 12th, 1870, or thirty-four years after her alleged first knowledge of the title, and *thirty-three years* after the

sale of the Blanc tract in lots and blocks by the city at the auction sales of 1837. (Rec. Vol. 5, p. 5304.)

The decrees in these cases were not rendered until April 30th, 1877, *eleven* years after the Monsseaux bill was filed, and seven years after the Agnelly bill was filed. The defendants can never be in fault for such delays in chaucery proceedings. The complainant could have compelled decree sooner, particularly in a cause where the entire proof relied on by the complainant was record proof, on file in the same court, and where, under a claim for discovery, the defendants were compelled to set forth their case and chain of title in their answers.

The only excuse ever set up for this delay, was, that Judge Durell, then district judge, was the only judge holding circuit, and by reason of his interest or former connection with the controversy, recused himself or would not act.

It was not the act of the city that put Judge Durell on the bench, and that he had such relation to the controversy that he could not act. As soon as Judge Durell was out of the way and a new judge in his place, the cases were moved to final decree with more than ordinary speed.

The record establishes that whatever of delay Mrs. Gaines experienced in getting possession of the Blanc tract, was either her own fault, or the result of circumstances neither controlled or under the control of the city of New Orleans. The decree for two millions, principal and interest, on the face of the record appears to be the punishment of the City of New Orleans, imposed not for its wrongs and frauds, but for the blunders and fault of the complainant in the resort to and prosecution of remedies selected both as to form of remedy and the fornm by her as her own election.

The various alleged fradudulent devices alleged to have been adopted by the city to wrong the complainant, in addition to the alleged wrong of purchasing from Evariste Blanc, are too frivolous for serious consideration. The first "fraudulent and oppressive act" claimed is, that the city divided the land into blocks and lots

and sold to third persons. There is no allegation or proof that the boundaries of the land were changed or made uncertain, or that the complainant has not recovered *all* of the land. If it is urged that the remedy was made difficult because from one strong holder the land passed into the hands of a number of weak holders, and involved a larger number of suits to recover possession, the answer is: that was your advantage; it was only by reason of this subdivision that you were let into chancery, where you could include the entire tract in one bill. If the complainant had been compelled to submit her pretensions to a jury in a law proceeding, she would never have recovered a square inch of land from the estate of Clark.

It is eminently characteristic of the complainant that she should complain because the land was divided and not kept as a swamp, and yet in her grasping greed for money clamorously claims that the defendants must pay the putative profits of *city property*, because the land was laid out into streets, blocks and lots.

The next wrong charged to the city, as perpetrated to delay her in enforcing possession, was the defence of the suit 122, in which the city was a defendant. It is true that this cause was defended and successfully defended, and her pretended title, as then set up, held bad by the United States Supreme Court. The city had the right to defend, even if she was only able to set up an unsuccessful defence without being subject to damages in any form of action; there can be no doubt of its lawful right to *successfully defend* against the bill in No. 122, when a recovery by the complainant in that bill would have been a fraud in the sense of decreeing the woman a title which she never possessed.

It is incomprehensible how any lawyer should set up the defence of the city against the bill 122, as delaying Mrs. Gaines in getting possession of the Blanc tract, as she claimed only a part of the land, one-half as the assignee of her mother, and four-fifths of the other half as forced heir. A suit for partition would have been necessary before she became the sole possessor of a foot of

the land; she would, if successful, only reach the state of *tenant in common*, with undivided joint title, and would have lost one-tenth of the property afterwards decreed to her. The defence of 122, by the city, was, as it turned out, a benefaction to the extent of one-tenth of the entire tract.

The record proof in the case upon which the district judge acted, demonstrates that the delays involved in the complainant obtaining possession of the Blanc tract, were the result of the acts of the complainant as to nearly all of the delay, and as to the balance the result of events not controlled or controllable by the defendant. Neither law nor equity can punish the defendant for the delinquency of the plaintiff to the tune of two million dollars, principal and interest. The district judge who rendered this decree was right when he said the complainant had no remedy at law for this delay: to have been strictly accurate, he should have added "nor in any other forum."

THE BILL DOES NOT CHARGE THE COMPLAINANT WITH A SINGLE TORT OR WRONG, ACTIONABLE EITHER AT LAW OR IN EQUITY; NOR DOES THE PROOF SUPPORT AND ESTABLISH THE ALLEGATIONS OF THE BILL AS MADE.

The first "fraud" charged as basis of liability and as being in the language of the bill "illegal and oppressive," is involved in the seventh subdivision of the bill: That by reason of the subdivision of the property into blocks and lots, and its sale at auction, and because of alleged want of good management the city derived insufficient profits from occupancy, and therefore the account, as stated by Weller, the master, in the former case, 2695, was too small to be satisfactory to the complainant; that in fact the Weller accounting was wrong. The reply to this is: that dispute should have been settled, and was settled in the former decree, of which you have accepted satisfaction.

The second specification of fraudulent, "illegal and oppressive" action is hinted at in the eighth subdivision, is the rebellion

which overthrew the authority of the United States for a while in the State of Louisiana, and that she was delayed by that overthrow. The rebellion and overthrow of federal authority was not the act of the City of New Orleans, as a municipal corporation, but the act of a public enemy. The complainant was prompt to use the courts that the insurgent power set up, and certainly will not be heard to complain to a federal court that the rebellion did not last long enough to permit her to recover in the courts established by the rebellion.

The most astonishing fraud and "illegal and oppressive" act charged against the city, is in the eleventh subdivision, where the charge is, that the persons to whom the city sold in 1836, conspired with the city to impede and delay her recovery. If this was very wrong, and there is law for the present bill, Mrs. Gaines should have hunted down these fraudulent oppressors, and taken another two million decree against them as a mild punishment for their misdeeds.

The next oppressive conduct charged, is in the same subdivision. That the city received a large sum of money as the purchase price of the sale of lots and blocks in the "Blanc" tract, charged to have been $400,000, and has had the use of the money ever since. If this is true, what is it to Mrs. Gaines or her representatives: it never was her money. If she had seen fit to accept the price received by the city for its sales, she would have instantly by the act confirmed all of the sales. Estoppel would have arrested all of her efforts to get possession of the land or any account of profits.

The next offense charged, is that the ejected in the ejectment bills against Monsseaux and Agnelly, petitioned the city to pay the decrees against them to Mrs. Gaines, and the city refused to do so. Of this statement in the bill there is no proof, as we will hereafter show. But suppose it to be true, as stated in the bill, and the complainant is entiled to the decree rendered in the case on appeal, she is face to face with her own proposition that the

consent of the city to pay the debts of those defendants, was not necessary to create the obligation to pay. If there is any law for the decree appealed from, the obligation to pay Mrs. Gaines all of the decrees rendered in the Monsseaux and Agnelly bills, it was a legal or at least enforcable equitable obligation which this litigation had passed into the form of a decree. The refusal of the city to stand as the direct debtor of Mrs. Gaines, did not, if there be any law for the decree rendered in this cause, in any manner impair the position of Mrs. Gaines, as obligee, or add anything to the city's liability.

If, on the other hand, the city was *not bound* in law to pay the decree to Mrs. Gaines, the city had full right to refuse to do so, and incurred no additional obligation to her in refusing.

It was a tangled brain that conceived that the refusal of the city to pay even a binding obligation of its own in any manner changed the character of the obligation by the refusal to pay on demand. It is curious to examine the proof offered before master Sabourin, in attempted support of the application to the city to pay the debt of others.

The first attempt at evidence of any kind was the interrogation of the defendant in the bill. The defendant answered that it knew of only one petition, that document was attached to the answer, and is a document which does not disclose who the petitioners were. The attorney who wrote it simply represents that he represents a large number of the defendants in the ejectment suits, and seems also to represent Mrs. Gaines. That the document was drawn up by her or under her dictation, is evident from the tenor of the complaints set forth, being the same as in the bill. (Document "B" filed with answer, record, vol 1, p. 55.) This document is dated May 12th, 1879. The bill was filed August 7th, 1879.

The answer to the interrogatory states that no action was had beyond a reference to the corporation counsel, and that before he could act the bill was filed and this litigation commenced.

The next attempted proof on this subject was an alleged copy

of a petition said to have been addressed to the mayor and administrators of the city on May 16th, 1870. L. Barnet and two hundred and twenty-three others, many of whom are not defendants in the ejectment bills, and, as far as the record shows, without interest in the matter. The proof shows that this paper was inspired by Mrs. Gaines. In fact, the paper, on its face, demonstrates the fact. The paper is given in transcript (Rec. vol. 1, p. 121 et seq.). Upon this petition no action beyond reference for investigation and report was ever had in the City Council. It was never refused. The bill in this cause was filed before any action was had.

The next proof of petitioning was a document from the heirs of D. B. McCarty and others (Rec. vol. 1, p. 431). This was not a petition begging the city to pay the debts of the petitioners, but a prayer that the city advance them money enough to pay costs of transcript and appeal, and aid them in a bond for supersedeas on appeal

This paper was referred to James McConnell, at that time special counsel of the city, and on the 20th of August, 1877, he reported back to the council in writing, stating that the master in the Monsseaux and Agnelly cases was piling up on every block in the Blanc tract such enormous estimates of conjectural profits, and charging interest as if profits came in cash every year, that he thought it unjust that the decree should stand unquestioned, and recommended that the city provide those who could or were willing to appeal, with the means of obtaining a transcript for appeal.

The next in order is a letter from one E. Abell, dated September 6th, 1870, in which he complains that he holds property on the Blanc tract, and that he cannot sell or mortgage by reason of the Gaines ejectment suits, and asks the city to release him and others from the suits by compromise, if compromise can be had on principles of justice (Rec. vol. 1, p. 2421). On this letter there seems to have been no action of any kind.

The next petition in order, in which documents were offered

before the master, is the petition of Mrs. Gaines herself, and discloses her notion of compromise: it is given in full, Rec. vol. 1, p. 551. The document is rather in the nature of a letter of gratuitous business advice than a petition, and starts out with a false statement concerning the reason of the veto by the mayor of the ordinance for the purchase of the Blanc tract, and in kindness of heart to confer great benefits on the city, and in order that the swamp today subject to tidal overflow and to inundation during every heavy continuing rainstorm, "might at an early day be the seat of wealth "and fashion—to be to New Orleans what the Fifth Avenue is to "New York, I propose to execute my deed in fee to the City of New "Orleans for the whole tract, reserving square No. , which I "wish to donate to the French Orphan Asylum, in aid of a large "sum already devoted for it, and square No. , upon which I "wish to build a residence for myself, for the sum of $1,600,000: "being $930,391 less than I could *in equity* claim, viz.:

"51 squares at the rate of those sold in 1837,.....	$875,568
"Interest on same 19 years at six per cent.....	998,147
"Interest on same for 15 years at five per cent.....	656,676
"Total.....	$2,530,391."

The *compromise* was proposed to save all interested parties from expense.

As the city was then governed, there were two legislative bodies, the Board of Aldermen and Assistant Board of Aldermen. Any act of legislation must have the concurrence of both bodies, acting independently. This application seems only to have reached one body, the Board of Aldermen, who referred it to a committee, where, after taking the opinion of one or two lawyers, evidently in interest with Mrs. Gaines, the matter dropped (Rec. vol. 1, 552 et seq). The committee, it appears, was a joint committee of both boards, and no action seems to have been had by the Board of Assistant Aldermen, nor any final report to either board. The reason why lies in the history and scandals of the early days of reconstruction and its first remarkable legislature then in existence, but is not a part of this record.

The only other indication of any petition to the city is contained in the deposition of John Bietry (Vol. 1, pp. 598, 599), in

which he states that Mrs. Gaines at some time since 1870, as he thinks, seven or eight years before his testimony, procured him to get up another petition: she was boarding at the St. Louis Hotel at the time, and exhibited great interest in getting up that petition. The petition was for compromise by the city, but what it contained or what became of it, whether it was ever completed or presented to the city, does not appear.

This, as far as we can find, is all of the attempted proof of petitions to the city. There seems to have been no action, certainly no refusal beyond that to be inferred from non-action.

If any action at law for this supposed wrong had been contemplated, it would have tormented the best lawyer in the world to frame a petition or declaration not demurrable.

The next fraudulent act alleged, was the alleged refusal of the city to respond to a call in warranty alleged to have been made by the defendants in the Monsseaux and Agnelly bills, setting up that the proceedings being in equity, the federal court being a court of limited jurisdiction could not entertain the call in warranty.

This allegation is untrue in fact. If the federal court had possessed the authority to hear a demand in warranty, it was elective with the parties made defendants by Mrs. Gaines, whether they would make the City of New Orleans defendants *quoad* them in that suit, or resort to an entirely separate action. They did not elect to attempt any call in warranty. If it be true that Mrs. Gaines had a right to have the city called in warranty, and the city must be mulcted in damages because the defendants did not elect to call, the fault is her own in selecting a remedy in equity where the rule of procedure will not allow the proceeding, and for bringing her suit in a forum of limited jurisdiction, unable to entertain an issue between the City of New Orleans and its resident citizens, between whom the federal court could not arbitrate.

If she had elected to institute her suit at law in the courts of the state, there would have been no trouble on that score.

It is unfortunate, also, that she was first to provoke the ruling that call in warranty could not be entertained in the forum she had selected.

We have shown *ante* that when the city in bill No. 122 called for the heirs of Evariste Blanc to warrant the title conveyed by their ancestor, Mrs. Gaines was prompt to set up the inability of the court to entertain that proceeding.

This complaint is hardly a sufficient basis for punishing the city to the tune of two million dollars, nor was it strictly honest to set it up as a ground of complaint in the bill.

The next cause of complaint is, that the city was a party to the suit of Fuentes et al brought to recall the probate of the alleged will of 1813, too frivolous as an alleged ground or excuse for the decree appealed from, to merit any discussion. If the cause had been tried, the probate would have been recalled, or at least ought to have been.

The next "fraud" practiced by the city was calling the complainant an adulterous bastard: if untrue and not privileged, this was libel or slander, for which she would never have dared sue at law, where the truth would have been plead in justification and established by proof. She knew it was not safe for her to face a jury from any part of the civilized world on that issue.

The day has not yet come when libel is punished in damages in equity courts, at least with a measure of damages of the character disclosed in this record, making the libeler pay judgments against third persons and pretended accounted profits that ought to have accrued to third persons whose very names are unknown either to the plaintiff or the court imposing the punishment.

The next "fraudulent and oppressive act" for which the defendant is punished, as averred, is that the city employed counsel to defend the defendants in the Monsseaux and Agnelly bills.

This is false: the city was made defendant in the Monsseaux bill, and appeared by its counsel to defend that bill. The answer denies that the city employed counsel to appear for the other defendants.

The complainant, in an attempt to prove this allegation, introduced attested copies of all of the city ordinances relating to the Gaines cases to be found.

The ordinances are here in transcript, and are all to be found on pages 110, 111-113, 114 to 150, Rec. Vol. 1, and negative the averment in the bill in all respects.

In further attempt in the same direction, the complainant produced a copy of the contract between the City of New Orleans and Miles Taylor and James McConnell, solicitors for the city, together with the ordinance under which the contract was made. This is to be found on page 104, vol. 1, record. It will not be insisted that the contract tends to establish the allegations.

The letter of James McConnell to the mayor, June 22d, 1878, was also introduced for some purpose not apparent, but negatived the pretension of employment to appear for any other defendant than the city, where it was defendant, and for the city where it was plaintiff, as in the Fuentes suit. Conscious of failure in proof, the complainant called James McConnell to testify as to his real relation to the city, and to the other defendants. Miles Taylor was dead and could not be called. Mr. McConnell did not claim privilege, but stated his exact relation to the litigation in his deposition to be found Rec. vol. 1, 608-644. Mr. McConnell was also again called by the defendant; his deposition is on page 180, vol. 1, record. In his deposition he states that he acted for the defendants in the Agnelly and Monsseaux bills only when retained by the defendants for whom he appeared.

Not a defendant could be found to swear that the city furnished him counsel to defend the case or aid him in any defence. If the averment had a grain of truth in it there could have been no difficulty in establishing the fact: for if there was any estoppel in the act it had become the interest of the defendants in the ejectment bills to establish the facts necessary for estoppel.

But suppose it had been true that the city did furnish coun-

sel to these defendants, moved either by interest, charity or hatred of Mrs. Gaines, no such monstrous result, *quoad* Mrs. Gaines, could have resulted. The sole estoppel would have been between the city and the *defendant*, for whom the counsel was furnished; if that defendant held the city warranty of title in binding form, and should afterwards sue on the covenant in *that suit*, the city might have been estopped from pleading or setting up that the defendant in the ejectment proceedings did not make an adequate defence against either eviction or accounting.

There are few lawyers, we imagine, who would advise that the contract of warranty covers rents and profits received from the defendant on eviction on the basis of aggravation resulting from holding in *bad faith*, for that was the wrongful act of the evicted, and in so far as under the wonderful system of accounting adopted in these ejectment bills, the real rents and profits were swelled by bad faith, there was no estoppel against defence in a suit on the warranty tending to reduce the damages in warranty down to what would be the true basis in case of good faith possession. If the law was otherwise, the city would be compelled to indemnify the party for damages and loss, the result of his own wrongs. A bad faith holder of realty is bound to abandon possession as soon as he is admonished either by fact or law that he is a tortious holder.

The decree appealed from is based upon the theory that if the city employed counsel to defend against the ejectment suits of Mrs. Gaines, the city by the act became liable to pay all of the decrees to Mrs. Gaines. The proposition is too absurd for notice.

There is a suspicion of an averment that the complainant holds assignment of the pretended warranty of the city. This matter, if it is pleaded in issuable form, we have shown would oust the jurisdiction of the court both *ratione materiæ*, being an action of law, and *ratione personæ*, by reason of the inability of the assignors to invoke the jurisdiction of the federal court in Louisiana.

The averment is utterly unsustained by any proof as a general

proposition, and was not considered by the court in the decree appealed from.

When Wilder, the factotum of Mrs. Gaines, and who in fact managed her litigation for her, was called as a witness for complainant (Rec. vol. 1, 626), he swore that he was the attorney in fact of the complainant to conduct her business and defend and prosecute law suits. When inquired of, whether he had superintended compromise with the defendants in the Blanc tract, he answered that he had in some cases, but Mrs. Gaines was in the habit of making compromises without his knowledge; that he would furnish a list of those with whom he had compromised, with the acts or writings. That although Mrs. Gaines had decrees of eviction against the occupants of the Blanc tract, he only knew of one person who had been actually evicted; that there were not many actual evictions; not more than five or six.

When asked whether Mrs. Gaines had not made compromises with many of the defendants to the effect that if they would surrender the property, she would remit rents and revenues, he answered that he was aware of no other terms of compromise than those set forth in the documents which he promised to produce. Afterward, when demanded again by defendants, Wilder produced ten papers, called compromises, printed in Rec. vol. 1, 689 et seq.

The documents are all in like terms and have substantial similarity; there is a conditional transfer of the supposed action of warranty against the city, and for a nominal sum in additional consideration, Mrs. Gaines binds herself that when she recovers of the City of New Orleans in an action on the warranty, said recovery shall *ipso facto* effect a fee title in the evicted. As the entire interest of Mrs. Gaines and her succession was before or at the time of her death sold to discharge lien debts bearing on the land, this covenant can never be carried out. In all of these acts of compromise the parties with whom she contracts are all treated as residents of the City of New Orleans.

Wilder also produced a paper at the same time which he entitled a "List of Compromises." Rec. vol. 1, 688. If this is a list

of the persons with whom compromises had been made, there is no proof upon what terms the forty-seven persons named in the list compromised, if there was compromise.

Although the complainant seemed reluctant to produce any written acts of compromise, the defendant compelled the production, in order that the exact terms might be known, as it was suspected that some clandestine combination had been entered into to deal with the supposed warranty as of more value than the wretched lands recovered by Mrs. Gaines.

The result was, as expected, and illustrates the unscrupulous cunning of this wonderful woman in the ways of indirection and fraud. The result of the form of convention made between her and those of the evicted who contracted with her, is fraudulent on its face. The defendants were to abide by the outrageous decrees for rents and profits rendered against them; were not *to be evicted;* were not to *pay* the decrees against them, but turn them into merchandize by sale to Mrs. Gaines, she *giving them the land* for their supposed action of warranty. They were to *lose nothing.* Mrs. Gaines, on the pretence that the evicted had been damaged by decrees for account never *paid* by them, but used as an asset, was to sue the city for the *price* received by the city and these monstrous decrees for profits. The result to be reached was, that the defendants in the ejectment suits were to pay *no profits* and lose *no land.*

The action of warranty only lies for *indemnity for loss* where there is good faith on all sides, at least where there is good faith in the vendee, though there may be bad faith in the vendor. The scheme concocted by this woman was a scheme of *profit* not *indemnity for loss.* As the assignee of any right of action of any of the evicted, she could only recover such indemnity as was *due to them.*

For years she has struggled to have the City of New Orleans delcared holder in *bad faith,* and had accomplished the result. All of the decrees against the evicted declare that *they* purchased the

land *knowing that the title was bad, that their vendor had no title;* the decrees for rents and profits in monstrous amounts have this bad faith as the apology for the monstrous measure of damages decreed.

This woman seems in the so-called compromises to have forgotten this result of her industry and its real effect upon the defendants with whom she was now trading.

Under the decrees, as rendered, if the city purchased from Evariste Blanc, knowing that its vendor had no title, and was bound to know that the title was in Myra Clark Gaines, then those who purchased at the auction sales of the Blanc tract, and those who purchased from these vendees, and the entire chain of vendors and vendees down to the vendees named in the ejectment bills purchased the land knowing that their vendor had no title, and that they took no title because they knew that the legal title and right to possession was in Myra Clark Gaines, as the heir of Daniel Clark.

The position of those who attempted to sell this woman a right of action for warranty of title then, was that of a purchaser who bought and occupied property which he knew did not belong to his vendor, but did know that it belonged to another who had the right to evict him at will, he having full knowledge that his possession and receipt of rents and revenues was a fraud upon this particular heir of Daniel Clark.

It is not possible that the jurisprudence of any civilized country would mulct a vendor *to such a vendee* in damages for being compelled to give up to the true owner such illegally obtained profits.

The law of Louisiana has assigned such vendees a place and defined their rights. The rule in Louisiana is, that a vendee, aware that the thing purchased belonged to another, or of the danger of eviction by another, if evicted can recover *no damages.* He may recover the price he paid if he has not expressly stipulated to the contrary, or expressly bought at his own peril. If the

rule was otherwise, it would encourage dishonest eviction. *Jeannin vs. Millaudon, 5 Rob. 76; Hall vs. Nevill, 3 An. 326.*

This case construes Art. 2452, code 1870, 2427 of old code which reads: "The sale of a thing belonging to another person is "null. It may give rise to damages when the buyer knew not "that the thing belonged to another person," To refuse damages in case of eviction, where the buyer knew the land belonged to another." *Scott vs. Featherstone, 5 Ann. 306; C. C. 1965; C. P. 711 Nash vs. Johnston, 9 Rob. 8.*

The complainant in her greed to recover extraordinary profits and damages, with no offsets for betterments, cut off recourse by the evicted to the city for indemnity *for damages recovered against them* on eviction, and if she now had assignment of the claim against their vendors, the claim can be only for the price they paid their *immediate vendors*, not the exaggerated bid for the lots at the auction sales by the city. The object of the rule is simply to restore parties dealing knowingly with the property of another the price he took for property which both vendor and vendee knew did not belong to either of them, but to Myra Clark Gaines.

SABOURIN'S REPORT AS MASTER.

It seems a waste of time to deal with the report of Sabourin as master in a case so utterly beyond the jurisdiction of the court in equity. If it is worthy of consideration at all, it is because this litigation as it has been condensed in seven volumes of printed record, with this report as a climax, stands as a marked illustration of the groundlessness of the theory, that equity should take jurisdiction of a controversy to avoid a *multiplicity of suits*, with confidence that the result will justify the assumption. Mrs. Gaines was let into equity, it was alleged, to avoid a multiplicity of suits, and yet this record discloses the fact, that the result was suits by the score. The report also stands as a demonstration of the fact, that equity does not always deal with the interests of litigants better than courts of law, and that the provision of the Federal Constitution guaranteeing trial by jury is well worthy of the solicitude of this court that it shall not be impaired.

The report is vicious, illegal in authority and original inception. As we have shown, the case went to the master by an order of reference made as a punishment for an accident; went there before there was any issue joined; before the judge who made the order of reference could lawfully make any decree directing the master how to state the account or measure the supposed liability of parties. In fact, the master was to try the case *at once*, the court retaining practically only the right to hear the case on appeal from the master. That master was a person who held large demands for fees awarded him in the two last ejectment bills for supposed services as master in stating the accounts in those cases. These demands had passed mostly into decrees in the Monsseaux and Agnelly bills, were chargeable in those cases as adjudged costs in a case where, if the allegations of the bill be true, the defendants against whom they were charged were insolvent. The complainant, Mrs. Gaines, was notoriously

in that condition. Therefore these demands, as they stood adjudged, were of comparatively no pecuniary value to Sabourin, consequently, it was to his interest, if the opportunity was provided, to change these worthless demands against the defendants in the ejectment bills to demands against the city of New Orleans, from whom he would have hope of collecting them. His capacity as a master was evidenced by the record of his exploits in the two ejectment bills. His professional capacity was doubted by the counsel for the city of New Orleans. The court was asked to designate another master, who was at least free from pecuniary interest in the result. This was refused, and the report now before the court is the result, and it is as vicious in its finding of fact and of law, as the counsel for the city apprehended it would be, when they failed to secure the removal of Sabourin.

It is true that he did not report back his own allowances of master's fees in the ejectment bills, but he reported back in substance, that the city was chargeable with the payment of all the decrees against the defendants in the Agnelly and Monsseaux bills, ejected from any portion of the Blanc tract. His adjudged fees in those cases are a part of those decrees as adjudicated costs. He knew well enough that liability to pay the decrees in the two ejectment suits was liability to pay him the thousands of dollars of costs taxed in his favor as part of the decrees. Should the court desire to know how much of the $34,000 of costs, decreed against the city, was allowance of fees to Sabourin in the ejectment suits, it has only to examine the record of the constantly recurring judgments in his favor spread through the printed record, both in the Monsseaux and Agnelly cases.

The fact that he would consent to act as master in this case, after the record objection to him had been made, stands as irrefutable proof of the correctness of the conviction of the defendant's counsel, that he was thoroughly unfit for the office. We respectfully submit, that his conclusions of either fact or law,

in so far as they rest on his judgment or conviction, ought to be received with extreme scrutiny, and be considered with distrust, and however reluctant the appellate courts may be to review the the facts involved in the report of a master in an equity case, this is a case, in which every statement of the report should be tested, and not allowed to stand as conclusive in virtue of the report itself, or from the fact that conclusions of either law or fact were injected into this case by statements in the master's report.

In a former portion of this brief we made the statement of our inability to find any taxation of costs in either the Monsseaux or Agnelly cases, upon which the item of $34,000 of costs could be based. A subsequent examination of the record page by page led to the discovery that the Agnelly case had been referred to J. W. Gurley, Sr., to tax costs, that although the statutes provide how costs should be taxed, and the fee for taxation, Mr. Gurley did make a report in that case of his views of what the costs should be, or what costs were due in the case, reporting also that as costs he ought to have the sum of $475 00 as a just compensation for taxing the costs. This report is to be found in the printed record, vol. 6, page 5998. We presume that this sum, reported by Mr. Gurley as compensation, passed into the decree and formed a part of the $34,000. He states that he arrives at this fee of $475, by charging twenty-five dollars against each defendant in the decree. We still adhere to our former statement in respect to the taxation of costs as correct. This report of the master, and supposed taxation of costs, if carried into the decree and made a part of the $34,000, the gross sum adjudged for costs, was a marked fraud upon the defendant in any view of the case.

The Agnelly bill was a multiple bill, many suits in one, permitted as it is said in equity. The bill was of course an ejectment bill, it was brought against hundreds of defendants, but to recover specific tracts of land from each. The land in litigation in that bill is described in the bill as thirteen distinct

and separate parcels, only one of which, the second in the list, covers the Blanc tract. The other twelve lots or parcels on the plan are either in remote portions of the city, or in remote portions of the state, none of them ever having passed through the hands of the city of New Orleans; she being charged with having been the disseisor only in respect to the Blanc tract. There were judgments, as they are termed in the opinion, but decrees in fact, in respect of other property than the Blanc tract. The decree covers or relates to the twelve tracts, and is against the possessors of several of them, decreeing ejectment and final account.

Now, if this taxation of costs, which purports to be a taxation of the total costs in the Agnelly case, is carried into this decree and forms a part of the $34,000, the master has not been content with charging the city in the decree with the costs against those who were evicted from the Blanc tract, but he also charges the city with the costs in obtaining decrees against the entire lot of defendants, including those having no connection whatever with the recovery of the Blanc tract. If a like taxation of cost has been made and passed into the decree in the Monsseaux case, the same is true of that case. In the Monsseaux case the complainant recovered, among other things, a large plantation described in the bill to have been about five leagues from the city of New Orleans, and another portion of property in the city of New Orleans, but miles away from the Blanc tract. Therefore, we say, that if under any law or under any circumstances the city of New Orleans could be charged with any of the costs in either the Agnelly or Monsseaux bills, or in both, the $34,000, claimed in the decree, cannot be taken as the just amount, and that no sum ought to be decreed, even if there is a liability, until a decent taxation and computation of the real costs chargeable against the defendants in those suits can in some way be made.

The defendant objected to the draft of the master's report before it was returned into court for all the heresy and errors

contained in the draft. The master declined to change the report and returned the defendant's objections with his report. As soon as the report was filed the defendant excepted to the report as filed. That exception is to be found in the record, volume 1, page 1676, etc. The exceptions were elaborate and raised all the questions relating to the report, that we ask the court to consider.

1st: The reference was premature, and the defendant could not be called upon to account before a hearing and final decree This was overruled. But we submit that a stronger reason than is stated in the opinion of the court is necessary to excuse or justify such practice, and give validity to the master's report.
2d: That the master was in error, if the reference had been regular, in reporting the defendant liable, either in law or equity, for any connection with the matters stated in his large account, and that the items thereof were not founded either upon fact or proof, or warranted by any law.

The items or charges reported by the master as liabilities for which the city must account, are divided into two distinct divisions or classes covering two different periods or eras of time. The first era was limited to commence on the 10th of May, 1837, when the city sold the property out of its possession, because of the fact that the complainant made a written waiver of all claims prior to that date. From this date he marks off an era ending apparently with the time when an account between Mrs. Gaines and the defendants in the Monsseaux and Agnelly cases began to run. During this first era or period of time, he finds and states, that the defendant was out of possession of the realty. For the second era or period of time, he takes apparently the period covered by the accounts taken in the Monsseaux and Agnelly cases, charging the city with the full amount of those accounts with interest. In other words, he exchanges the city of New Orleans with the defendants in the Monsseaux and Agnelly cases, making the city of New Orleans the judgment debtor in place of the real defendants in the decrees of those cases.

As to the first period or era, we have shown that there was no jurisdiction in equity to state an account between the owner of real estate and a defendant not in possession during the period covered by the accounts. If the master had been competent to act as master in any case, he would have known that there was no obligation growing out of the relation of the city with Mrs. Gaines, during this first era, founded either upon law or equity.

As was expected by the counsel for the defendant when they failed to have him removed, he found that if a naked tort feasor enters upon a realty of another, knowing that it is the property of another, and remains any time, be it ever so short, and then by act of conveyance transfers this property in form to another tort feasor, who knows that his vendor has no title, but is a trespasser, and who in turn transfers to another having like guilty knowledge of the true ownership, each taking possession independently in turn—that in such case any one of these successive tort feasors can be held responsible in tort for all the other tort feasors, and be made to account for all the supposed rents and profits of *all the wrong-doers*, even if the true owner allows this trading process to go on for half a century before the last one is ejected and the lawful possessor reinstated, and that this was an obligation recognized in equity, and gave rise to an account which equity would take and enforce.

Therefore he states that he finds himself involved in two momentous enquiries. 1st: As to what revenues were derived by the insolvent, dead or departed holders of this estate for the period intervening between the 10th of May, 1837, when the city quit possession, up to the time when the defendants in the Monsseaux and Agnelly bills went into possession. How many tortuous holders had been in possession during this interval of nearly half a century, the master, the complainant, the defendant and the court never knew, and never will know, or anything concerning their names or condition; and no one knows whether they ever held any such possession as to

hinder entry by Mrs. Gaines; of this the complainant and the master both took excellent care to remain ignorant. 2d: That he must solve the question whether, if no revenues were derived from the estate by these incognito possessors holding, as he averred, adverse both to the complainant and the defendant, then what revenues, profits or "values" *might* have been derived, if any, from such unimproved and vacant squares and lots, by the occupant or possessor, had due diligence and reasonable care been used by him, an unknown disseisor, for the production of the same. Again we say, the conviction of counsel for defendant, that the man was unfit for any judicial enquiry, was no error of judgment.

The master reversing the order of enquiry, laid down by himself, takes up the second or last period first, that is, the period of time for which the complainant had decrees for accounts against disseisors found in possession. He pretends to copy the amount of the decrees against this defendant without any enquiry as to whether there was any truth in the objection that many of the defendants were dead when the bills against them were filed; that in many cases there was no service, and that the decrees *pro confesso* were frauds upon the parties defendant and upon the court, and in many cases no decree at all. From this method of exchange the master makes the city of New Orleans indebted to Mrs. Gaines for amounts pretended to have been decreed in the Monsseaux and Agnelly cases against those evicted from the Blanc tract. It is stated in the decree that these items foot up to a total of $576,707 92, as stated in the opinion confirming this report, to be "for improved and unimproved land already in judgment." The master then goes back to his first era, to-wit: the period between the date of the possession of those really evicted and May 10th, 1837. He does not find, or apparently care, who was in possession during this period, simply knowing that the defendant was *not in possession.* By a process of misrepresentation and disregard of the proof before him he, as we comprehend his

dreary English, finds in his conscience that he is a remarkably good man, because he is not as vicious as he had an opportunity to be; that he could, if his heart had been altogether bad, find *common law* to support the conclusion that he had a right to find; that when the city sold the property in 1837 it might have received a sum of $482,525 for this unimproved land; he might also have found that at *common law* he could compute interest at five per cent. and then capitalize the interest at the end of ten years; then compute interest on the new capital for another ten years and capitalize again, and so on, until he made a sum amounting to over two millions of dollars, and then charge the city five per cent. on that amount as rent revenues and value received by these unknown intermediate adverse possessors. He does not, however, feel wicked enough for this cruelty. Yet, if we understand his report correctly, we understand him to adhere to the sum of $482,525, as the money which the city did or ought to have received from the auction sales on May 10th, 1837. On this he computes interest at five per cent. down to 1877. Why he stops at that date is not manifest. This amount of interest he adds to the principal, which, he says, makes a total of $1,442,225, which he finds to be the pecuniary benefit that came to the city from that auction sale and to the adverse possessors during this period. He admits that the prices at which the land sold in 1837 were somewhat inflated, and therefore he deducts thirty per cent. from this amount, taking the balance, viz., seventy per cent of $[redacted] $482,525 as the real sum representing the value upon which he should predicate his conclusion of how much the city ought to pay for the rents and profits which the strangers and alien trespassers on the Blanc tract ought to have realized, if they had been energetic. He then found—no one knows how—that these unknown trespassers, names not known, ought to have realized a profit equal to five per cent. per annum on this sum of $1,442,225, or that they did so realize that profit. He then thinks that, although the city never had a dollar of this con-

jectural profit or gain, and does not know who did enjoy it, if it was ever earned, yet the city must pay this "rent and profit" over to Mrs. Gaines.

This model master then goes into a detailed division of these total rents and revenues, dividing them between lots and blocks of unimproved land. If he could not and did not name a single occupant or pretended owner of any one of the blocks during this period, it is difficult to understand why he did not let his lump estimate stand; unless he went into detail to try to make out that this was a complicated account, and therefore by reason of its complication maneuvered the case into equity. And it may be possible that he did so as a basis for his demand for $50,000 for compensation for this work to be taxed against the city as costs. This demand is still pending before a master in this case. On pages 978 and 979, vol. 1, printed record, he makes what he terms a recapitulation of the total of these uniquely estimated rents and revenues of $824,660 12. The interest on these rents and profits he makes to be $797,401 58, making a total of $1,622,061 70 as rents, profits and value for the period—as we understand it—between May 10th, 1837, and the date when the evicted in the Monsseaux and Agnelly bills went into possession and were compelled to account. Whether this sum is intended by the master to cover not only this period but both periods, does not appear from the recapitulation, or from any part of the report.

In all of this pretended accounting there was not a single offset or counter claim to be considered. The city had, and necessarily could have no account with persons whose names were unknown, and of course no reclamation against any known persons, if compelled to pay the decree based on this report and system of manufacturing rents and profits. The defendants in the Monsseaux and Agnelly bills were not made parties to this bill. The city, if compelled to pay the decrees obtained by Mrs. Gaines against them, by their becoming merged in the decree in this case, could by no process obtain any decree in the case,

which would regulate and determine its relation to the parties for whom it had discharged decrees. Mrs. Gaines, the complainant in this bill, as well as the complainant in the Agnelly and Monsseaux bills, would stand with double decrees for the same amount, with one set of decrees against the defendants in the Monsseaux and Agnelly bills, and another lump decree for the same amount against the defendant in this case.

We have suggested some motive that may have led the master to present his pretended account to the court in the form of an apparent account with lots and blocks, in so far as he was dealing with the amount due Mrs. Gaines by reason of the decrees against the defendants in the Agnelly and Monsseaux bills, instead of reporting the names of the individual defendants, against whom the decrees are rendered in these bills.

The most vicious feature of the report is this disregard of Exhibits C^1 and C^2 filed with the bill. The bill only admonished the defendant of the "judgments" contained in these two lists or exhibits. The court in the final decree refers to these exhibits as the basis of the first item in the decree. The master instead of taking into his report the decrees as they stand in the ejectment bills, cut up his report into charges against the *lots and blocks* in the Blanc tract so as to *avoid carrying into his report the names of the defendants in the ejectment bills whose "judgments" are charged over to the city.*

The purpose was both manifest and vicious. The records in the cases now printed in the record were all thrown together in a mass of commingled separate papers. It was the work of months to arrange them for the transcript in this cause. Sabourin, of his own cunning or by the advice of some one interested, so arranged his report that it would be and was impossible to investigate the truth of his statements within the limited time allowed for examination and exception.

As a specimen of his cunning we give a copy of his report covering lots in block 5, taken from page 883, vol. 1, taken at random as a specimen :

"New Orleans, 10th January, 1881.

864 Square No. 5. Lots Nos. 11, 12, 13 and 14.

This report is made from 10th March, 1834, to 30th April, 1858, 21 years, as unimproved property, and from the 30th April, 1856 to 30th April, 1878, 20 years, as improved property; interest to 10th January, 1881.

Unimproved.

This property sold in 1838 for	$2,200 00
70 per cent. of which would be	1,540 00
Rent at the rate of 5 per cent. per year would be $77 00, and from 10th March, 1837, to 30th April, 1858, 21 years to date when property was improved	1,617 00
Interest, 5 per cent. on yearly rents to 10th January, 1881	2,487 00
Rent and interest while unimproved	4,104 00

Improved.

Rent from 30th April, 1858, to 30th April, 1878	$2,459 33
Interest, from 30th April, 1878, to 10th January, 1881	327 37
Rent and interest while improved	2,786 70

Recapitulation.

	RENT.	INTEREST.	
While unimproved	$1,617 00	$2,487 00	
While improved	2,459 33	327 37	
	4,076 33	2,814 37	
Total rent and interest			$6,890 70

E. SABOURIN.

New Orleans. *Master in Chancery.*"

The item "*while improved*," is supposed to represent some amount decreed against some person.

Now the record is printed and has some sort of an index. Yet we believe that it will be practically impossible for the court to ascertain by inspection of the record what defendant was evicted from lots 11, 12, 13 and 14, block 5, or in what suit the eviction (if it ever occurred) was effected, and an account stated from the 30th of "April 1858, to April 30th, 1878," or the name of the evicted party, the decree against whom the city is decreed to pay. Suppose there *was a party* evicted from these

lots and he should sue the city for the amount of the decree against him, and the city having *paid this decree* should set up as a defence that it had paid the amount of the decree sued on to Mrs. Gaines, how far would the record in this cause go to prove the plea?

That there was method in this system of report, and the reason why it was resorted to, becomes certainty when we find what was really concealed by the scheme.

The court, in its opinion, Record, vol. 1, 1101, explains its decree on this report by stating that the master reported that the amount of judgment in the Monsseaux and Agnelly cases was $576,707 92, and made that sum a charge against the city. There is nothing of the kind in the report. The alleged "judgments" are not reported on separately or in groups, but are carried into the report, as shown by the above specimen report, as *rent* from given lots, supposed to cover the time when the defendant in the Agnelly or Monsseaux suit was in possession and for which he had accounted. How the court found the total amount of judgments to be the sum he states, $576,363 78, we do not know. We cannot make it by dividing up Sabourin's report into the two kinds of rent.

The court finds from the report of Sabourin that the amount found due for "rents" when the defendants in the Agnelly and Monsseaux bills *were not in possession*, and no one knows who was the disseisor, to be $1,045,633 78. The master's reports *are of both kinds* of "rents" in a lump sum of $1,622,061 70, without the name of a single person against whom any portion of the judgments had been rendered, or *whose debt* the city was called on to pay.

Where did the court get this figure as the amount of payments in the Agnelly and Monsseaux cases?

All that the bill called for in that particular was the amount stated in exhibits C' and C² filed with the bill. The sum total of both exhibits is not the sum stated in the decree, but is as we add the amounts, only $517,082 89 and on its face $59,625 03,

short of the figures given by the court, as deduced from Sabourin's report, as interpreted by the court.

It may be insisted that that portion of the recital of Sabourin, which precedes his report of account with lots and blocks, in which Sabourin states: "In the matter of improved property the master has already had under consideration by reference to him in suit No. 3663" * * * (see vol. i, 1073), is a statement of the decrees in the two ejectment bills carried into the decree in this case. Counsel for the city thought so when the report first came in, and when it was excepted to. An examination of this recital, however, developed the fact that it is a romance. Sabourin did not take his figures from this recital, nor is it extracted from the record in the ejectment cases, either as to amounts, parties or description of lands, in so far as we can ascertain from a most careful examination.

The method and viciousness involved in shaping the report so as to conceal the names of the debtors in the pretended decrees taken up, is more apparent when we consider the issue made in the answer that Mrs. Gaines had *settled with a large number of these defendants in decree* by some sort of compromise, by which the defendants were let off for less than the amount of the decree.

Wilder, the general attorney in fact, and sometimes solicitor of the complainant, swears in effect that sometimes Mrs. Gaines would compromise with defendants and never let him know of it. The number and character of these compromises he did not know, nor could the counsel for the defendant ascertain. But Wilder *did know* of compromises made by himself as her attorney, and was compelled to furnish a list, to be found on page 688, vol. 1, printed record. A comparison of that list with exhibits C^1, C^2, filed with the bill as a list of "judgments" in the Monsseaux and Agnelly bills, shows that of this list of names of those *who had compromised with Wilder*, the following named persons figure in *both* the list of compromises and exhibits filed with the bill. The list is given with the

amount of alleged "judgment" against each defendant, by which it appears that of the pretended "judgments" Wilder alone had compromised to the extent of $156.477 85 of face value of decrees, excluding interest:

Avegnio, Philip, Jr.	$10,652 43
Avril, Prosper	443 25
Aloune, Caroline	3,843 34
Baudue, Mrs. J. F. and husband	4,765 85
Bermudez, Jules	3,957 60
Bietery, John and wife	3,798 90
Bordes, Pierre and F. Randon	3,147 37
Carriere, Henry	5,438 54
Cassard, Jules	
Delord, Mrs. Simeon	16,735 45
Despeaux, Jean	1,424 94
Dejean, Mrs. Arthur	7,529 21
Dumourelle, Victor	401 60
Foy, Florville	17,221 96
Gautier, Auguste and Annie	5,541 48
Goudrau, J. V. and wife	387 80
Gubernator, J. L.	11,148 18
Jacquet, Mrs. J. B.	1,405 67
Lapène, Jules	1,678 55
Locoul, Widow R.	3,105 90
Larque, Henri	286 10
Laurens, Widow W.	4,852 50
Lafabre, J. T. D.	599 55
Meilleur, Michel	1,597 72
Morel, C. and wife	6,657 75
Monsseaux, P. H. Mrs.	1,295 64
Morrere, Widow Bartholmy	12,200 61
Marmouget, Mrs. J. B.	6,723 03
Mace, L. J. E.	2,751 40
Amount forward	$ 140,562 32

Amount forward	$ 140,562 32
Oschnier, Widow D.	482 67
Ollie, Jean	1,332 75
Phillips, Ellen	700 29
Renecke, G. O.	2,567 25
Rochereau, A.	8,038 95
Sauvage, Mr. and Mrs. Jean	1,540 00
Spitzfaden, H.	1,001 86
Zimmerman, W.	251 76
	$156,477 85

Wilder was compelled also to show as far as he would disclose the *terms* on which this sum of $156,477 85 had been compromised, and in what shape it had left the relation between Mrs. Gaines and the defendants in the decrees compromised. He produced ten specimens of the contracts of compromise entered into. These contracts follow Wilder's list in the printed record, and commence on page 689, vol. 1. By these contracts it appears that for a transfer of the supposed right of action on the supposed covenant of warranty of the City of New Orleans, and a trifling sum of money ranging from $25 to $400, Mrs. Gaines covenants to release the decrees and make a deed of conveyance of the land to the evicted upon her obtaining *final judgment on the warranty against the City of New Orleans*

It goes without argument that if there is no fraud in this arrangement by which it is contrived that there shall be *no eviction*, and the defendants in the ejectment bill *keep the land*, and make this trade in supposed right of action the right, if any, acquired by Mrs. Gaines, was a *legal right* to a *legal not equitable* right of action coming to her by conventional assignment not cognizable in equity nor in the federal courts in Louisiana, the City of New Orleans being a citizen of Louisiana, and the assignors of the supposed *chose in action*, presumably of the same domicile and citizenship, at least the contrary not appearing in the record.

The studious care with which the master avoided carrying into his report the names of the defendants in the decrees carried into the account against the city, renders it impossible to determine what the *master did with this compromising* and was intended to accomplish that end. The sum total of the decree shows, however, that the full total of all of these compromised decrees was carried into the final decree.

Another wrong intended to be accomplished and consummated, becomes evident when your honors examine the alleged "judgments" or decrees in the Monsseaux and Agnelly cases, as they are extracted and compiled in an appendix to this brief. Many of the pretended decrees *are not decrees* of eviction in form, and many of the pretended decrees were never signed or enrolled and are not decrees in any sense of the word. The concealment of the names in the master's report renders it impossible to tell what portions of the "judgments" in the report were ever decreed and stand final.

Again, there was a square issue made by the answer that in many cases the defendants named in the ejectment bills were dead long before the bills were brought, and in that particular there was proof to sustain the answer. There was also a denial of legal service on many of the living defendants against whom alleged decrees *pro confesso* had been taken. The court in its opinion glides over this issue by saying that there was overwhelming presumption that *there had been service because there was decree.*

There is no *presumption* that a court of limited jurisdiction has acquired jurisdiction of the person of a defendant sufficient to give authority to render a decree based on contumacy. The record *must show* that the defendant was duly cited and called into court by unambiguous return of the proper officer. The concealment of the names of the defendants whose decrees together amount, as stated by the court, to the sum of $576,707 92, renders this inquiry impossible.

If your honors will examine the record of decrees *pro confesso*, as compiled in the appendix to this brief; you will find that in many instances the decree *pro confesso* is based upon a recital that the *pro confesso* is taken for want of *plea, answer or demurrer*. An examination of the record shows that in at least 90 per cent. of the cases of alleged default there never was *appearance* by the alleged defendant. If there was or had been legal service the *pro confesso* should have been based upon a recital of *want of appearance*. Through ignorance, probably, the counsel for Mrs. Gaines in all such cases perpetrated a wrong on the court, tending to mislead the court in its action when called on to make final decree based on such entry of default. Any court being asked to sign final decree based upon a recited decree *pro confesso* based on *want of "plea, answer or demurrer,"* would presume that there *had been appearance*, and that there was no question whether the defendant was in court and would not usually in such case demand sight of the original process and return.

Many of the alleged subpœnas in both ejectment cases, and the return of the marshal, if any was ever made, are lost. No one knows what they did contain. The returns on those *in the record* are not such as to inspire confidence that there was legal service.

We give a specimen of return taken from page 2262, printed record, vol. iii. The return is on a subpœna in the Monsseaux case, addressed to one Joseph Despleaux :

"Marshal's return.

"Received December 8th, 1865, and on the 11th day of January, 1866, served a copy of the within subpœna on Joseph "Despeaux, the defendant named herein, by leaving in the "hands of Mrs. Margaret Despleaux, at *his domicile* on St. Ann "street, near Broad, in this city, a free white person over the "age of 18 years, *and the widow of said defendant.*

"T. REDDINGTON,
"Spl. D'y U. S. Marshal."

In many cases the service is alleged to be on "an agent," and where the service is attempted to be made at domicile the service in most cases is questionable and in many clearly void.

The studious concealment of the names of the persons defendants in the decrees charged against the city, renders it impossible to investigate whether there ever was such decree, or whether the defendant ever had his day in court. We charge that the report was made intentionally in such form as to render this inquiry practically impossible.

We respectfully submit that in the event that this court finds any jurisdiction over this cause, and that the city is held to account, this vicious and vague report of the master should not stand, even if the cause must be remanded for another account with a competent master fit for such duty.

If it should ever become the duty of this court to go far enough into this cause to review, to consider the question of rents and profits, and whether the city is chargeable with *five per cent. per annum* on the alleged price for which the land in question was as it is alleged sold at the auction sales in 1837, as "rents and revenues" *that ought to have* been earned by the unknown alleged disseisors, the first question to be considered is the exact relation of the First Municipality and the City of New Orleans to Mrs. Gaines, and the land in question.

The record shows that the First Municipality *never was a disseisor*. Up to the date when the city parted with possession there was in law *no possibility of disseisin*, as to the complainant. She only acquired a legal title upon which she could bring ejectment on the alleged probate of the will of 1813, *to-wit:* late in the year 1856. Up to that time she had been standing on a bogus title, made up of alleged forced heirship, and an assignment of the pretended widow's right of *Zulime Carriere*, her mother. This title or pretense of title had been stamped out by this court. The title of the occupants of the Blanc tract in so far as it could confer the right to possession was *better than hers*, and had prevailed against her title in all of the courts and continued to so prevail until 1861, when the Hennen case was determined.

Disseisin is the forcible entry upon the legal estate of another and ousting him by force, and cannot occur unless there is legal title *and possession* in the *dissiesee*, and always involves or implies force.

The City of New Orleans during the time intervening between its purchase from Evariste Blanc, down to the time when it parted with possession in 1837, never had ousted or *disseised* the complainant for she never had been in possession, and was setting up title that would not permit her to oust any one, *even if she had recovered on the title set up* as forced heir and alienee of the alleged widow's community share; in that case she would only have had at most *nine tenths of the title in common as tenant in common.*

This continued to be her pretended title and estate until she filed the bill in 2695, filed on December 22d, 1856, *after* the probate of the alleged will of 1813.

The city parted with possession, May 10th, 1837, so that as to all of the now unknown holders who held from 1837 to practically 1857, twenty years, the complainant *never* set up a title that if asserted would have ousted them of possession. They would all have held one tenth of the title in common tenancy. Nor was her title as good as this all of the time for, by the decree of this court in case No. 125, she had been decreed to be a bastard, her mother's pretense of widowhood had been decreed to be a fraud, and the paper by which Zulime transferred her pretended rights as widow of Daniel Clark, declared waste paper.

Therefore not only did she set up a title void and upon wnich she never could have had possession, but she, in her supplemental bill in No. 125, had *renounced* all claim to title as *universal legatee* under the alleged bill of 1813. This court, in Gaines vs. Hennen, and in Gaines vs. New Orleans (2695) refused or neglected to pass on the effect of this renunciation that under the law of Louisiana and in its courts, would have forever estopped Mrs. Gaines from setting up title under the re-

nounced will. This renunciation may not be effective in equity as estoppel against setting up new title after renunciation, but it ought to work estoppel against setting up against *any person* any claim for rents and revenues for disseisin or adverse possession prior to December 22, 1856, when she first set up the title on which she finally recovered.

If this be true then the master, even if the city had been in possession from 1837 to December 22, 1856, ought not to have commenced the account prior to the 22d of December, 1856.

Taking possession of the estate of which an ancestor died seized before the heir has entered into possession is *not disseisin*, but *abatement*, for disseisin always imports a wrongful putting of another out of *actual possession*. The entry of Mary Clark, Evariste Blanc or the First Municipality was not even *abatement* under the title set up prior to 1856, because prior to that time the complainant had no legal title upon which she *could have entered into exclusive possession*.

Under the law, therefore, there can be no resort to pretended *disseisin* or tort involved in any adverse possession or to any accounting back of December 22, 1856, or back of the moment when the alleged will of 1813 was admitted to final probate, which was but a short time prior to filing her bill 2596.

If this be true then all of the conjectural profits which it is said might have been earned prior to 1856, and carried into the report and decree, is without a shadow of legal warrant, even if the city *had been in posssession up to 1856*.

If any further reason for not charging the city with rents and profits during the period when the probate of the will of 1811 was in force and unrevoked, even if the city *had been in possession*, is necessary, it is found in the legal effect of the judgment of the Probate Court admitting the will of 1811 to probate, and the judgment of that court adjudging the estate to be the property of Mary Clark, the residuary legatee. Both of these decrees were judicial acts of a court with undoubted jurisdiction, this is not even disputed. Both of these decrees acted upon the

property of which Daniel Clark died seized, and judicially determined the status of the property and the legatee.

Under the decrees of this court in the prior Gaines cases, this judicial action was final and conclusive until reversed on appeal or set aside for fraud; at least it was good as to all third parties acting on the faith of the decrees.

These decrees of the Probate Court were also, while in force, as the law has been laid down by this court, conclusive against the complainant as to any subsequent will of the testator, for that issue was made in the Probate Court and determined against the claim of a subsequent will. At the time the will of 1811 was offered for probate, a suggestion of a subsequent will was formally made. The court acted on this suggestion, ordered a search for the suggested will and caused a summons to issue to all the notaries in the jurisdiction, commanding them, as provided by statute in such cases, to appear in the Probate Court and produce any will of the deceased in their custody.

All of the methods provided by law for the trial of a suggestion of a subsequent will were resorted to. The probate of the will of 1811 was a judicial determination that there was no subsequent will, and that the will of 1811 was the *last will* of Daniel Clark and valid in law. This doctrine finds conclusive authority in a case determined by this court in one of the very ejectment bills in this record. The case of *Davis vs. Gaines*, reported in 104 U. S. 386, was an appeal from the decree in the *Monsseaux bill*, ejecting the heirs and representatives of *Kenner* from a large plantation, about fifteen miles from New Orleans. The title set up by defendants rested for validity on the effect of the probate of the will of 1811, and the official acts of *Richard Relf*, executor, acting under letters testamentary granted by the probate court. In the only opinion in the Gaines cases coming up from Louisiana, in which there was not a difference of opinion amongst the judges and sharp dissent from a bare or very small majority, this court considered the legal effect of this

action of the probate court on the will of 1811, lays down the correct law on the subject with remarkable detail. In that opinion, on page 394, dealing with the stereotyped objection of Mrs. Gaines, that the probate of the alleged will of 1813 rendered the will of 1811 and *all proceedings* had under that will and probate null and void, says:

"It is objected, however, that the discovery of a later will "and its probate showed that the will of 1811 was utterly void, "and could furnish no valid ground for the order of sale. But "it must be borne in mind that the will of 1811 had been duly "admitted to probate by a court which had jurisdiction of the "subject matter, and whose duty it was to ascertain and declare "whether the will presented to it was in fact the genuine last "will and testament of the testator. Having declared the will "of 1811 to be the genuine last will of Daniel Clark, acts done "under that probate in a lawful manner, until the discovery of "a later will, were valid and binding.

"The English authorities hold that the record of probate "and of the qualification of the executor is conclusive evidence "of the existence of the will and of his authority."

The opinion was delivered by the late lamented Justice Woods, who, from long experience on the circuit, was as familiar as any man can be with the law in force in Louisiana and the procedure in succession matters in that State. The opinion is a marked illustration of his conscientious, painstaking method of dealing with issues, and the self-denying labor in the discharge of official duty for which he was eminent, involving him in labor that undoubtedly cut short a most useful life.

The citation of authorities in support of this proposition that should find conviction of its correctness in the bare statement, is exhaustive and complete confirmation. He cites:

Allen vs. Dundas, 3 T. R. 125; Rex vs. Vincent, 1 Strange, 481, is a case where Vincent was indicted for forging a will of personal estate. On the trial the forgery was established, when the defendant produced a probate of the will in question. The probate was held conclusive evidence of the genuineness of the will.

Wooley vs. Clark, 5 Burn. & Ald. 746; Williams on Executions, 6th Amer. Ed. 590, note x; Parkman's Case, 6 Co. 19; Graysbrook

vs. Fox, Pl. Cour. 282; Semine vs. Semine, 1 Lev. 90; Thompson vs. Harding, 2 El. & Bl. 630; Parker vs. Kett; Waters vs. Stickney, 12 Allen (Mass.) 15; Peble's Appeal, 15 Serg. and R. 39; Kittredge vs. Folsom, 8 N. H. 98; Stone vs. Peasley's Estate, 28 Vt. 716; Steele vs. Renn, 50 Tex. 467.

The statutes of Louisiana require the probate of all wills, both of immovables and movables, without distinction, and prescribe the procedure in great detail, both in the Civil Code and Code of Procedure, and the heir or legatee taking the succession with or without the benefit of inventory, goes into the possession of the inherited estate under a decree of the court. The absence of such decree will so cloud title that the heir could not alienate or compel a vendee to accept his conveyance. There is no State in the Union where so much special judicial action is required in the settlement of successions as in Louisiana. Hence all of the rules defining the effect of judicial action apply with marked force and application to the acts of Louisiana probate courts, as has been held by this court.

This case of *Davis vs. Gaines* then disposes of all pretense of disseisin by the City of New Orleans or any of the "unknown holders" prior to the probate of the alleged will of 1813. The entry of Mary Clark, the residuary legatee under the will of 1811, Evariste Blanc, or the First Municipality, alienees of the "Blanc tract," was not even *abatement*, for the complainant not only had never been in possession, but had been judicially declared not entitled to go into possession, under her pretended title, a condition that continued to attach to her for nearly twenty years after the auction sales of 1837.

Where the judge who made the decree in this case and counsel for complainant found basis for so much talk of *disseisin* is one of the many incomprehensible matters involved in this cause.

The alleged French authorities said to warrant this decree because the city *ousted* the complainant are also disposed of by this state of facts and are not worthy of notice.

The question, whether if there had been the slightest right to recover rents, profits "and value" for the use of this property by strangers as rents and profits that "*ought to have been received*" by these unknown strangers in alleged possession if they had managed the property "with prudence," the rents and profits should be, as stated by the master, five per cent. on *seventy per centum* of the supposed price at which the lots and blocks were adjudicated in 1837, or *five per centum on one hundred per cent.* or the full alleged price at the auction sales, is a question with which it is extremely difficult to deal with patience or without disgust.

There never was a more monstrous perversion of fact or disregard of proof in the history of human controversy in the courts.

The Blanc tract is within the city limits, and if the weather was sufficiently dry to permit going over the disputed land without a boat, the master could have inspected the land itself. New Orleans, as shown by the maps and testimony in the record, is a city extending along the bank of the Mississippi river, with a frontage of over ten miles on the river, but of very little expansion back from the bank of the river. The reason for this extension along the river bank lies in the fact that by reason of the deposit of sediment for centuries the land along the bank is the highest land in the vicinity. At about three and one-half miles back from the river, in the rear of the city, and running nearly parallel with the river, is a ridge or elevation, nearly as high as the bank of the river in front, known as Metairie ridge, shutting out the waters of Lake Pontchartrain, lying in the rear of the city, forming a valley with a surface at the point where the Blanc tract is situated eleven feet below the surface of the river at high water or from the apex of the front levee, only protected from being submerged at high water by the front levee. The tract is in form a trapezoid, the smaller end of which lays near the foot of Metairie ridge, distant from the front on the river about three and one half miles or

thirty-two blocks. At the rear of the land, running at the foot of Metairie ridge, is the Bayou St. John, the natural drainage of the valley, breaking through the ridge near that point and discharging its waters into Lake Pontchartrain. The valley is protected from tidal overflow from the lake by dykes or levees along its banks. Canal Carondelet bounds the land upon the up river side and is an artificial canal, navigable by small vessels, extending to within nine blocks of the river front. The level of the Blanc tract, being below the average level of the lake, the canal along the Blanc tract is kept within limits and to the proper level by artificial dykes or levees, that, at times of long prevailing easterly winds, overflow and inundate the valley sometimes to the depth of several feet. Lying, as the tract does, on the bank and vicinity of the Bayou St. John, the drainage selected by nature to drain the valley, it is the lowest in point of level of any land in that portion of the city. There is no natural drainage to the rear, and prior to the recovery against the city in 2695 was artificially drained by an expensive draining machine at the rear of the Blanc tract, that by powerful machinery threw the water over the levee into Bayou St. John, the city paying the canal company for the privilege of draining into the bayou.

The system of drainage in New Orleans has always been surface drainage from the high land on the river front back into this valley. Therefore, all of that portion of the city lying in front of the Blanc tract acts as a water shed carrying back all water finding its way through or over the river levee. All rainfall and sewage finds its way back into this valley. The draining machine from which the city was *ousted* in 2659 was located at the rear of the Blanc tract, as the lowest point in the valley. After the city was ejected from this draining machine the complainant took no steps to continue artificial drainage, and the tract is under overflow with the drainage and sewage of a large city after or during any considerable rain storm, and has at times been submerged by tidal overflow from the lake.

If the master had desired to inform himself by an inspection of the tract he would have been compelled to select a time when the weather had been continuously dry for some time, when he might have found it possible to have gone over the tract. He would have found "alligator holes" spoken of by the witnesses still in existence as large fetid pools, and back of Broad street what are by courtesy termed streets are broken, grass grown ridges difficult to recognize as streets.

That portion of the tract reported on by him as "unimproved squares and lots," he would have found a wide, open common with grass-grown ridges across its face, the ruins of some former street grading marking off the common into squares; apparent depressions without drainage becoming so many pools on any considerable rainfall. And he would have found that portion back of Broad street reported by him as improved represented as far as improvement goes by a few miserable, cheap scattered structures, mostly of a single story, with few of them that could reasonably revolt at being termed "shanties."

If he had selected a wet period he would have been compelled to inspect his "unimproved" lots and blocks from a distance. These facts were all before the master in the depositions of Blanchard, the city surveyor, and witnesses who had been familiar with the locality since early in the present century, when it was an unreclaimed swamp, jungle. Although Sabourin returned these depositions with his report he gave them no heed or effect. The map, a part of the deposition of A. G. Blanchard, bound between pages 688 and 689 shows the relative portions of the tract improved and unimproved, but no map can give an adequate impression of the wretched poverty of the "improvements," or the dreary, sodden open common constituting the "unimproved" portion of the tract.

This is the locality which the complainant in one of her petitions to the city (record, volume 1, 551), indicates as a locality "that at an early day be the seat of wealth and fashion—"be to New Orleans what Fifth avenue is to New York."

It is impossible to believe that the master for a moment actually believed it possible that with any kind of management the net revenue of that wretched semi-submerged territory could reach the sum he reported as the possible or probable revenues.

It would be unreasonable to hold any former holders to greater revenues, or greater care, or more prudent management of this property than was exhibited by Mrs. Gaines after she acquired the right to possession by the decrees in the ejectment against the city in 2659 and the last bills in 1877. The proof as to the result of *her* management as possessor was *no revenue of any kind*, or practically none, if Wilder, her factotum, is to be believed. (Record, volume 1, page 1035.)

But we have a better illustration of her prudence in management. The draining machine from which the city was ousted in 2659, the writ of assistance and return show that Mrs. Gaines went into possession 11th April, 1871. The installation consisted of a large building, a large battery of steam boilers and massive pumping machinery, which, according to the report of Weller, master, cost for its erection at least $18,000, fell into ruin and has disappeared, said to have been *stolen*. The building was so far detached from any inhabited portion of the city as to make the alleged felony possible unless protected by a watchman.

It seems impossible that this court will be called on to go far enough in this record to require any examination of this unwarranted report and unscrupulous accounting by reason of the manifest want of jurisdiction of the Circuit Court to take and decree any account therefor. We shall not expand this brief by an elaborate review of the depositions disregarded by Sabourin in fixing his estimate that 5 per centum of the 70 per centum of the auction prices of 1837 was an honest estimate of the measure of punishment to be laid on the city under the name of rents, profits and "value," but will call your attention to the depositions of the oldest and most respectable citizens of New Orleans who have personal recollections of the condition of the

Blanc tract during the period covered by the pretended "account," and the evidence of some of the largest holders of real estate in the valley between the river and Metairie ridge, where this property lays. The depositions are short and well worth perusal in connection with the literature of Sabourin.

Alexander Dimitry, for years connected with the state department in Washington, 76 years of age (Rec. vol. i, 284, *et seq.*), states that the financial panic in 1837 came in June; that there was no premonition of the crisis; that prior to the crisis the price of real estate in New Orleans was inflated beyond all reason or real value; that prior to that date real estate purchased by his family for $3000, was subdivided and sold for $24,000.

Felix Labatut, p. 985, 76 years of age, was one of the City Council when Municipality No. One bought of Evariste Blanc; that the part bought from Blanc for a cemetery was not on the property claimed by Mrs. Gaines; that the land was a swamp in great part, on which there was sometimes three feet of water; that hunters went there to kill ducks; that when sold by the city there had been no improvement except cutting through Broad street; that he does not know how any revenues could have been realized; thal the property is worth very little at the present time.

Charles Gayarre, author of a history of Louisiana, p. 698, vol. 1, was born in 1805; the land was nothing but a forest in 1822, and swamp from St. Claude street to Bayou St. John; shot snipe there. That improved property in New Orleans had not in his opinion netted 5 per cent. revenue from 1837 to 1875; that he does not know how unimproved property could be made to produce revenue; that property above Canal street was of more value than property below that street.

Charles Reymond, vol. 1, page 993; 87 years of age, went hunting there in 1814, and for seven or eight years afterwards.

John U. Lavillebeuvre, vol. 1, p. 995, was born in 1802; says that the land was a swamp called Blanc swamp; was inhabited

by crocodiles; was full of crocodile holes for which hunters had to look out while hunting there; that the land could not bring revenue unimproved.

Octave De Armas, 77 years of age, tells the same story, page 979. The same is true of the deposition of *Adolphe Dupree*, vol. 1, p. 1006: age 74 years.

The depositions of *John L. Lewis*, vol. 1, 681, *Michael De Armas*, vol. 1, page 1012, *Archibald Mitchell*, vol. 1, 1024, *J. Davidson Hill*, vol. 1, 1028, and *William A. Bell*, vol. 1. , all establish the monstrous character of the allowance made by the master.

If the fact that the land was originally a cypress swamp can be questioned after the positive proof contained in these depositions, it ought to be considered as put at rest by the effort of Mrs. Gaines to get Weller, the master, to report an account for *waste* in cutting cypress timber cut on this same Blanc tract, when the case of Gaines vs. New Orleans, No. 2695, was before him for account.

The deposition of Albert G. Blanchard, vol. 1, 628, and same witness recalled, vol. 1, 674, shows the present dilapidated condition of the property.

We respectfully submit that even if the court had jurisdiction to punish the city in an account of putative rents, profits and "value" for use, the report of Sabourin is too vicious to be made the basis of any such punishment. As a paper, we believe it unparalleled in the record of judicial proceedings.

Although there does not seem a remote probability, this being an action *ex delicto* sounding in damages, that the court will find itself able to sustain the bill or go beyond the bill in dealing with the case, we shall deal briefly with the pretended law upon which it is claimed there is warrant to assess damages in the form of putative profits conjecturally accruing to *strangers* to this record, said to be *unknown*.

In the opinion of the district judge, he was driven by the weight of unbroken authority to abandon all attempt to base

his decree or any part of it upon a supposed contract of *warranty* in the supposed acts of conveyance constituting the supposed chain of title of the evicted. He states that she has no action on the warranty because "*there is no privity.*"

We have shown in another part of this brief that, considering the character of all of the decrees obtained by Mrs. Gaines in this and in the Circuit Court, where there has been eviction containing, as they all do, the express declaration that both *vendor* and *vendee* knew that they were acting in fraud of the rights of Mrs. Gaines, as between vendor and vendee there can be no accounting for supposed rents and profits, for the decrees have stamped every holder from Mary Clark down to be evicted as rogues purloining unholy profits and possession from Mrs. Gaines, knowing that they were robbing her. As between these rogues courts will settle no questions of profit or loss resulting from their roguery after their acts have taken the impress of roguery at the hands of the judiciary. Therefore, the pretended account in this case could never have been stated in any action between these fraudulent *unknown* vendors and vendees, all of them judicially declared to have been equally guilty.

If this had not been the case the court would have encountered another unsurmountable obstacle. Where a right of action exists at all on the written warranty clause in a Louisiana act of sale of realty, it only exists where there is *conventional privity of contract.* If the warranty is in the usual simple form of a warrant of title as between the immediate vendor and vendee the vendee has action only against his *immediate* vendor. In order to give the vendee, if evicted, a right of action over against any former vendor, it is indispensable that the warranty clause should, besides the warranty of title, contain a conventional subrogation of the vendor's action of warranty against his, the vendor's warrantor. In such case the evicted can avail himself of the subrogation of right of action to proceed against his immediate warrantor's warrantor, for he has bought the right to do so.

This right to go back, however, ends where the subrogation ends, and if in the chain of title back the evicted finds a deed or act of conveyance that *does not show or have this special subrogation* there all privity ends and the right ceases. He can go back no farther with his action. Neither the bill or proof in this cause show the continuous existence of subrogation necessary to constitute privity back to the city. As to the "unknown" holders, neither the names or anything in the chain of title is given either in the bill or proofs. As to the evicted in the Monsseaux and Agnelly bills, the chain of title is not given either in the bill or proofs, save in a very few instances. A large proportion of the pretended decrees are based on alleged *pro confesso*, where there is no pretense of chain of title. And as the court will see on inspection of the pretended decrees compiled in the appendix, in many cases no shadow of a decree or eviction.

In supposed warrant of the extraordinary bill and more remarkable decree in this cause counsel for the complainant and the court have been compelled to wander into supposed Roman law and even to the *statutory provisions* of the Code of France for supposed authority. The reference is unfair, illegal and ineffective.

We know of but a limited number of unwritten systems of law recognized as law anywhere. They may be and probably are included in the following enumeration: The Law of Nations; the Law of War, probably a subdivision of the Law of Nations; the Law Merchant; the Law Maritime and Prize, and the Common Law of England in force only in England proper, and where it has been adopted by convention or statute.

All other nations of the earth claiming to be civilized have systems of law based upon a conventional statutory code of laws or its equivalent, where there is no representative or legislative department of government, and imperial decree is the substitute for legislative enactment.

From the moment of the annexation of the territory now included in the State of Louisiana, the French element of its population, and particularly the lawyers of French extraction, have been fearful that the common law, as adopted in the other States, would be adopted in Louisiana, and have vigilantly used their power to prevent this result. In accomplishing this end they have exhibited neither want of care or sagacity. The very first article in the Civil Code in force during the whole period covered by this controversy, is a statutory definition of the law to be in force in the State, and reads: "Law is a solemn expression *of legislative will.*"

Not content with this definition, that of itself would cut off all systems of law based only upon "immemorial usage," every constitution of the State has inhibited the legislature from adopting any general system of law as an existing system, thus putting it beyond the power of the legislature to adopt either the common law of England or any continental system of laws now in force, or that has been in force in the past, as a system of laws. Not feeling safe even with all these prohibitions a further expedient was added to effect the same end. All judges in rendering any decree or judgment are required by statute to state in the decree in virtue of what law the decree is made. This statute was intended to put the courts of the State on the same basis of restriction as the Court of Cassation in France, practically sitting as a court for the construction and application of express statutes, and always citing the statutes under which the decrees are supposed to find warrant.

There is no *civil law* in Louisiana, if by civil law is meant the system of law that prevailed in Rome or the statutory systems of continental Europe. The determination of any question by any court in Europe is of no authority in Louisiana nor of any avail unless it may throw light upon the true construction of an ambiguous Louisiana statute. It is plain that to make such decision of any utility the text of the statutes construed must be exactly the same, and the foreign statute capable

of undoubted translation into the *same text* as the Louisiana statute and adopted under the same conditions where contemporaneous circumstances and conditions must be taken into consideration to arrive at legislative intent.

All of the citations from the Code of France from the determination of French tribunals or French commentators prior to or since the adoption of the Code Napoleon or the existing code of France, unless they relate to *precisely the same statute*, and that statute ambiguous and of disputed construction, are worse than disingenuous in the intent with which the citation is made. It would have been just as fair and pertinent to have referred to the statute law of Germany or Brazil as a warrant for the decree.

We have examined with care all of the pretended foreign authority cited, and say most emphatically not only do they fail to warrant the pretended doctrines made, but are overborne by express Louisiana statutes unambiguous in terms.

We have shown by the terms of express articles of the Louisiana Code and the judicial construction given these articles by the highest court in the State, that a vendee and vendor of the property of another, both knowing that the title and right to possession of the property trespassed upon is vested in another, can have no recovery against *each other* concerning rents and profits while in fraudulent possession. A warranty of possession and against eviction made by a fraudulent holder of an estate, to which he had knowingly no right, to a fraudulent vendee with the same knowledge, if made effective by statute, would make every system of codified law, of which it formed a part, a disgrace to civilization.

Bourgnignon vs. Destrehan, 5 La. 115, is the only case that we have been able to find where there was an effort to recover damages of the vendor of the evicted party dispossessed by ejectment. In this case the vendor of the evicted was joined as defendant with the evicted in a suit by the owner for rents and profits while kept out of possession. As to the vendor there was judgment for the defendant, from this there was appeal.

In affirming the judgment of the court below, the court after stating the common law concerning trespass to land, says:

"By our law, however, if the party illegally entering on "the land, is suffered to remain therein for a year, the owner "loses the right of possession, and is driven to his petitory "action to recover the property. The rents and profits accru- "ing after that year, or the fruits gathered, for which the pos- "sessor may be responsible, are given on entirely different "principles from those for which reparation is afforded for a tres- "pass, and his responsibility varies according to circumstances. "If the possessor be in good faith he makes them his own, up "to the time suit is brought to recover the property. If in bad, "he owes them during the time of his possession. For their "recovery the law has given an action in express terms against "the person who has enjoyed them, and it is totally silent in "regard to recourse against the person under whose title the "possession was first taken. This silence in relation to respon- "sibility for the fruits which may be due in a petitory action, "and the express declaration that the party who commands the "trespass, or under whose authority it is committed is subject "to the possessory action, and may be made responsible to the "proprietor for the damages sustained by him, is a just reason "for courts to assume that no such action was contemplated to "be given, in a case such as that before us. *Pothier traite de "possession, Nos. 118 and 123.*

"In the case first put, where the vendee makes the fruits "*his own* in consequence of the belief that he was the owner, it "would be difficult, nay, impossible, to conclude that the per- "son who sold, even in bad faith to that vendee, should be re- "sponsible to the proprietor for that which the law expressly "says belongs to another. In case the vendee is in bad faith, the "absurdity it is true is not presented, but the grounds on which "the possessor is made responsible for fruits, repel the idea "that the vendor of that possessor is bound to make them good. "These grounds are two: First, that the fruits, whether natu- "ral or the result of industry, or whether already gathered or "not, are considered as accessories to the land, and must be re- "stored with it. The maxim of the Roman law was *omnis fruc- "tus non jure seminis, sed jure soli percipitur.* The second is, "that every possessor in bad faith is considered to have im- "pliedly contracted with the proprietor the obligation to pre- "serve the thing for him, and to deliver it to him with every- "thing which belonged to it. *Pothier traite du droit de pro- "priete, Nos. 151, 335, 336.*

"There is another ground why a vendor of land whose ven- "dee is evicted by a petitory action, cannot be considered as a "trespasser, and subject to the responsibility of one. Our law "refuses to one trespasser who has paid damages, an action for

" reimbursement against his co-trespasser, or against him un-
" der whose authority he inflicted the injury, and yet it is clear,
" that the vendor with warrants is subject to an action by his
" vendee, for the repayment of the fruits he may be compelled
" to return to the proprietor. *La Code, 2482*, (now 2506.) 3
" Martin's Rep., O. S. 288.

" It appears to us, that no action lies by the owner of the
" land, against the vendor of the party, who is evicted in a peti-
" tory action, for the fruits or revenues; that he can only be
" reached by recovery from his vendee, to whom he may, or
" may not be responsible in warranty, according to the circum-
" stances of the case, and the nature of his engagement."

We have given this extended extract from the opinion, not only because it is the only reported case of an attempt on the part of an evictor to proceed *directly* against a vendor of the evicted, that we have been able to find in the reports of adjudicated cases in the courts of Louisiana or elsewhere, but because we are unable to find that the doctrine laid down has ever been questioned or doubted. It seems to be the accepted jurisprudence of Louisiana, and conclusive against every pretense of right of action in this cause.

The rights flowing from one year's possession, referred to in the opinion, relate to the statutes of Louisiana controlling the possessory action, whereby any person having a title apparently good on its face, if permitted to retain actual possession for one year, acquires a right to possession that if disturbed will entitle him to a restoration of the possession against the world, upon showing one year's possession under the conditions prescribed by Art. 47, Code of Practice. The real owner can only evict after such possession by a resort to a regular petitory action.

As evidence that the rights of the real owner after successful eviction depend entirely upon the statutory provisions of the code, we give below an extract from one of the cases cited by the District Judge in his opinion in this case: The case cited is Morris vs. Abat, 9 La. 352 (should be 552). This was a case between a vendor and vendee of realty. The vendee was evicted and brought action on the warranty of title. The court, Martin, Justice, gave construction to what was then Art. 2482

of the Louisiana Code, and is 2506 of the present code the article cited in the opinion. Just prior to the date of that decision, the code of 1808 had been repealed, and the code of 1825 substituted. The code of 1808, in Art. 57, had enacted: that "*if the thing sold had risen in value at the time of eviction, even without the aid of the buyer, the seller is bound to pay him the increase of value above the price of sale.*"

The evicted sought to recover damages under this provision of the old code. Martin, Justice, held that this article of the old code was rejected from the new code because the jurisconsults who compiled the new code thought the article dangerous in a new and growing country where the price of realty naturally advanced rapidly.

On page 557 of the report he says:

"This article of the old code, which imposed such fearful "responsibility on the seller, was accordingly suppressed, and "does not appear in the new one. The vendor's liability is "now clearly defined, and placed upon the most equitable foot-"ing. He is now only responsible for the price at which he "sold; for the fruits or revenues, where the party evicted has "restored them to the true owner; the costs of the suit of "eviction and warranty, and for any damages the vendor has "had to pay. See *Louisiana Code*, Art. 2482.

"To say that the word *damages*, *means* the loss of profits "not made, or to be responsible for the augmentation of the "value of the thing sold at the time of eviction, beyond the "price of the original sale, would be to restore and carry into "effect the entire provisions of the article in the Civil Code "which the legislature intended to suppress and repeal. It "would, in fact, reinstate the article of the former code, which "was recommended by the jurisconsults to be suppressed, and "which was formally suppressed and repealed on the adoption "of the Louisiana Code."

This doctrine was affirmed in *Downs vs. Scott*, *3 Ann. 278*, was afterwards questioned, but finally adopted as settled jurisprudence in *Burrows vs. Le Page*, *6 Ann. 297*, and has since been followed.

The rapidity and facility with which the various counsel for the complainant have changed front in asserting their theory of a right to recover in this case, and the uncertainty whether it will

not be asserted that the complainant had some right of action growing out of the supposed warranty clause in deeds of conveyance relating to the Blanc tract, is our excuse for citing *Hale vs. New Orleans, 13 Ann. 499*, a case determined while Judge Merrick, afterwards one of the counsel for complainant in the Monsseaux and Agnelly cases, was Chief Justice, and the organ of the court. The doctrine in the case is, that eviction, as an *actual fact*, is indispensable to enable even the warrantee to recover from the warrantor, and that the return of a writ of possession, to which the warrantor is not a party, is not conclusive evidence of eviction, with a respectable list of authorities in support of the doctrine. The record discloses the fact that at the time of taking final proofs, and while the matter was before the master for accounting, few, if any, of the alleged evicted had actually been put out of possession.

We have dealt with the authorities cited in the opinion in this cause in a review of that opinion, made an appendix, in the belief that the assumption of jurisdiction of this cause in equity and the theory of the pretended right of action tested by existing law, even if the court had obtained jurisdiction, are both so groundless and vicious that this court would have no occasion to go beyond the bill and demurrer, and not be called upon to deal with any further question or detail in this enormous record.

We respectfully submit that there is nothing but heresy and error in this record from bill to decree. That the entire proceeding is *coram non judice*. That the decree should be avoided and such emphatic stamp of judicial disapprobation impressed upon this proceeding as to render the recurrence of another like experiment improbable.

Respectfully submitted,

J. R. BECKWITH,

Counsel for Appellant.

APPENDIX.

Review of the opinion of Judge Billings and examination of the authorities cited in support of the positions taken in the opinion.

The first statement of fact is a palpable compound error of fact and law contradicted by the record. The statement is that the right to remedy in equity rests upon the fact that it is a "*suit for discovery as to the means which have been employed by the* "*defendant throughout this long period to hinder and prevent the com-* "*plainant from recovering possession of this real property.*"

It is evident that this sentence was written with utter disregard of the office of a bill of discovery. The slightest examination would have shown that the bill of discovery has never had such office, even when brought to procure evidence to be used in an action at law pending or about to be instituted.

The reference to authority in support of this assumption of law could not have been examined by the court, but must have been accepted by the court on the faith of statement in some indifferent digest as to the doctrine and range of the citation.

The citation is Comyn Digest, Chancery 3 B, 1. "Where it is laid down that a bill for discovery lies even where the action to be supported sounds in *tort*" is the language of the opinion.

This citation is to be found on page 467, volume 2, 4th London edition. The reference there is to 1 Brown, 96. In the digest it is stated that where *quare impedit* was brought against the ordinary by the patron for refusing to institute his clerk, a bill filed by the defendant in the action at law (the ordinary) to discover whether the clerk presented to him had not given a general bond of resignation, in order that he might set up the resignation as a defense to the actions *quare impedit* then pending against him, was held a good bill on demurrer. It is clear that the district judge did not examine the digest, but took the doctrine to be as given him by counsel for complainant.

The error in fact involved in this initial statement in the opinion lies in the statement or implication that the pretended defendant in this cause is charged to have used or employed any actionable means resulting in hindering the complainant in her ejectment proceedings, and in thoroughly ignoring the fact that if the city of New Orleans had committed any actionable *torts* there could be remedy only at law.

We pass without comment the use made of Root vs. the Railroad, 105 U. S. 189, and Hipp vs. Babin, 19 How. 271. It will doubtless surprise this court to learn that the doctrine in either of these cases can be mistaken, and that either of the cases should be cited as authority in support of the extraordinary assumption of jurisdiction in this proceeding.

Ex-parte, Bax 2 Vesey, Sec. 387, is cited as authority for the bill or a bill for accounting. The case itself could not have been consulted. It only involves on single questions in a bankruptcy proceeding, whether the commissioners in bankruptcy can proceed in accounting in the absence of counsel for the parties without special order of the court. The court held that the duties of the commissioners were similar to those of a master in chancery, and they could proceed *ex-parte*.

The opinion states that "there is another distinct ground "for equity jurisdiction where the complainant has received "judgment against several hundred tenants" (sic). (Tenants of whom? certainly not tenants of the city of New Orleans, as all of the defendants in the Monsseaux and Agnelly cases referred to held adverse to the city, asserting fee simple title in themselves,) "for rents and profits for varying portions of this long "period. These tenants are insolvent. The defendant in this "action is the warrantor of all of these defendants, and whatever "they owe the complainant, the defendant owes to them. The "defendant is not only a warrantor, but she is a warrantor who "has enriched herself by purchasing in bad faith the com-"plainant's property and selling it at a profit of $500,000. "This sum she has retained, and had the use of since the year "1837. *The complainant has no remedy at law upon this warranty "for want of privity.* EQUITY THEREFORE GIVES HER A RIGHT "OF ACTION."

The opinion must have suffered in the hands of the copyist

or printer. It seems impossible that such a procession of *non sequitur* could occur in the original manuscript opinion.

Since the case of Gaines vs. Hennen was decided, every decree in every case relating to the property belonging to the succession of Daniel Clark, has in unambiguous terms decreed as a solemn conclusion of fact that Relf and Chew as executors under the will of 1811, as attorneys in fact of Mary Clark, the devisee under that will; Mary Clark, as universal legatee under the will of 1811; Blanc, the purchaser from Mary Clark, and vendor to the First Municipality, and all subsequent alleged vendees in possession, were *at all times fraudulent disseizors, and all knew and ought to have known that their vendees not only were without title, but knew and ought to have known that the property belonged to the succession of Daniel Clark, and had vested in Myra Clark Gaines as universal legatee, and legitimate heir of Daniel Clark.* There is no law on the face of this planet that can rate any of these adjudged fraudulent *tort feasors* holding under fraudulent deeds purporting to convey fee title to be the warrantor of rents and profits of another like fraudulent *tort feasor*, going into possession with knowledge that his possession was fraudulent or that can or would hold such fraudulent disseizors of Mrs. Gaines to hold the relation of landlord and tenant, the one to the other, or warrant the more monstrous proposition that equity will create liability where there is no privity.

The very bill on which the decree is based negatives all pretence of privity, or that as between the city of New Orleans and the defendants in the ejectment bills brought against "the several hundred actual tenants," or as between Mrs. Gaines and the city there existed any relation of landlord and tenant. On the contrary, the bill shows that "the several hundred" held possession adverse both to the city and Mrs. Gaines.

Why there should be such constant reference to "tenants" all through the opinion is incomprehensible.

Such statements of fact and law should have been supported by reference to unquestioned precedents.

To support the bill as a bill for accounting, O'Connor vs. Spaight, 1 Schowles & Lefroy, 305, 309, is cited.

This is an Irish Case. The bill was brought to enjoin the landlord's suit for ejectment, and for an account to show that one year's rent was not due. The bill averred disputed boundaries, the rent being per acre; that there had been no receipts for rent when paid by the tenant; that the account involved goods sold and delivered, money loaned, disputed charges, and items double charged. The court granted the injunction, ordered a survey of the premises to determine the acreage, and held that it would hold the bill for accounting by reason of the complicated character of the dealings and disputed items. This case is no authority for entertaining a bill for an account of damages *ex delicto* against a defendant *not in possession*.

Corporation of Carlisle vs. Wilson, 13 Veasey Jr., 276, 278, is also cited. This was a case where the corporation insisted on tolls for property conveyed through the city, the right to toll having been established in a suit at law. The court held that equity had jurisdiction concurrent with law in matters of complicated accounts that by change in methods of transportation the tolls which had formerly been charged to the men who carried the goods themselves, or on horses, had become chargeable to the owners of stage coaches, the account had become complicated, (doubtless the tolls were specific on different articles of merchandise) and that it was an account to be surcharged upon which every inhabitant of Carlisle might be examined and held jurisdiction as an act of discretion under all of the circumstances.

The doctrine in this case is probably at variance with the doctrine as laid down by this court in recent cases cited in the brief. There is not enough of detail in the statement of the case to determine the question with certainty.

The balance of the cases cited to sustain the bill as a bill for accounting, have no pertinence. All relate to accounts not unilateral but complicated dealings where there was contract privity, express or implied, with items to be charged or surcharged.

Nelson vs. Harris, 1 Yerger's Rep. 372, is a long rambling case, in which it is difficult to determine what was decided, except that a court of chancery was an orphans' court, and trespassers on orphans' estates would be held to account.

1 Fonblanque's Equity, vol. 1, marginal paging 14 and 15, 4th Am. Ed., was doubtless cited in error, as it is authority against the doctrine which it is cited to support, as we understand the text and notes.

The opinion next states "the gravamen of the bill of com-"plaint is that the defendant by her direct efforts persisted in "*mala fides* has kept the complainant out of possession forty-seven "years, and until remedy by a court at law is practically impos-"sible."

It was always *impossible* for an owner of realty out of possession to obtain an account of profits for use and occupation of realty from another person also *out of possession* for the whole period, if the alleged disseizor, holding neither himself, by agent, or tenants' attorning to him, and doubtless will be *impossible* for all time to come.

The bill avers that the complainant has evicted the *tort feasors* in possession, and has had an account of rents and profits.

In support of this doctrine, Pultney vs. Warren, 6 Vesey, 73, is also cited. This case could not have been carefully examined before citing as authority on any question in this case. It was a complicated case of an attempt to hold an executor liable for *mesne profits* contrary to the rule of common law. The court held that the common law rule was as stated at bar, but that the executor by agreeing to abide the result of litigation between other parties, made as a condition upon which he obtained an injunction staying ejectment proceedings against him-

self, rendered him personally liable to yield rent and *mesne* profits during the term of his own personal adverse occupancy of the premises. At least we so understand the doctrine of the case which seems to have given the court great trouble and anxiety.

The next case cited is Riddle vs. Mandeville, 5 Cranch, 322. Why this case is cited is mysterious. In the very opening of the opinion Chief Justice Marshall says:

"If as stated by counsel for the defendants the question is "whether a court of chancery would create contracts into "which individuals had never entered, and decree the payment "of money from persons who had never undertaken to pay it, "the time of this court has been much misapplied indeed in "attending to the laborious discussions of this cause.

"The court would at once have disclaimed such power "and have so terminated so extraordinary a controversy."

The court had in a former cause between the same parties or concerning the same note, held that under the law, as it then prevailed in Alexandria, the holder of a dishonored note could not proceed against a remote endorser. That each endorser after paying the note had recourse only against *his immediate endorser*, who in turn might pursue his immediate endorser to the end of the list. The maker of the note and the immediate endorser of the holder at dishonor became insolvent, and were discharged in bankruptcy proceedings on execution on this note.

The court held that as all of the endorsers might in turn become liable, the fact that the immediate endorser of the holder was insolvent and could not take up the note and thereby get the right to proceed against his immediate endorser, a court of equity would under the circumstances of the case allow the holder to pass over his insolvent endorser and proceed against the next endorser remote as to the holder of the note, because he was bound on the notes and ought not to be protected by the insolvency of his endorsee.

The reference to Story Equity Jurisprudence, Sec. 687, is equally incomprehensible. A lessor is permitted to proceed

against an under-tenant on *his covenant* with the lessee because there is a *covenant* and contract in which, under certain circumstances, equity will substitute the under lessee for the lessee as covenantee. Mrs. Gaines never leased any property to the city, the city never held any covenant for rent from the persons evicted by Mrs. Gaines in her ejectment bills against those found in possession of the Blanc tract.

The case of the Emperor of Austria vs. Day and Kossuth, is also cited. This is a case of a bill by the Emperor of Austria as King of Hungary, to restrain the issue of shin plasters, payable in Hungary, purporting to be the bills of that State, but printed and issued in England. The sole question was, whether the English courts would restrain acts operating injuriously only in foreign jurisdiction. The court held that there was power to enjoin. What that doctrine has to do with anything in this controversy is not manifest.

The pretense that there is equity cognizance by reason of avoiding multiplicity of suits is too trivial to notice. If there is an earthly ground upon which any liability to pay this enormous sum of money, either at law or equity, can rest, it is a single obligation, a single liability from *one defendant to one complainant*, and could have been the subject of but one suit at law. A single action against a *single* defendant has no features of multiplicity, can have none.

The defenses set up by the defendant have only cold passing notice and are not even all enumerated or clearly stated.

As to the plea of prescription of one, two and three years, the judge entirely overlooked the fact that the time covered by the master's report as limited by the directions of the complainant covered a period of time, during which, according to the averments of the bill, the statement of the master and the recitals, in his own opinion, the defendant was out of possession of all the Blanc tract and therefore not liable for *mesne* profits going out of adverse possession or occupancy and that he had

held that the *real basis* of his decree rested upon the alleged *tort* of the city in the commission of acts tending to delay the complainant in *ousting* the real and actual possessors other than the city. All of these acts, if committed, were *quasi offenses* or torts under the law of the state, and as wrongs, in every legal sense, were *personal wrongs*, against the complainant herself and not *against her estate.* The plea went to the remedy against these alleged personal wrongs and should have been so dealt with by the court.

The plea is disposed of with a statement of bad law and the misapplication of authorities in supposed support of the statement is liberal. He states: "that this is a suit which, according to all authorities, both under the common law and the law of Louisiana, could not have been brought until complainant had recovered possession." If it had been stated that this was a suit which, under either system of law, could not be brought at all there would have been no question of its correctness. It is not true that an action for possession and *mesne* profits cannot be joined under the codified practice in Louisiana, and in equity a bill for ejectment and account of *mesne* profits, are always joined in the same bill.

The very case cited by the judge in support of his statement, Gaines vs. New Orleans, in 6th Wall. 612, was a bill of this kind and the case cited from 15th Wall. 624, demonstrates the fact that in that litigation the complainant not only recovered all of the realty in the Blanc tract then in the possession of the city, but $125,266 79, *estimated* rents and profits, and all in the same suit. The reference to this authority is unhappy.

Nor is this all of the error into which the court fell, in dealing with the plea of prescription.

He rested his decree upon a dual liability on the part of the city. He found that $576,707 92 of the amount decreed, arose as a liability from his finding the city liable to pay the decrees against the defendants in the Monsseaux and Agnelly bills, the evicted *tort feasors* who defended, set up title against the com

plainant. This was all that was involved in or depended upon the determination of those ejectment bills, if we except the monstrous conjectural, even thirty-four thousand dollars alleged, but untaxed costs in the ejectment suits. Assuming for the purpose of argument, that this ever was a liability of the city, the most that can be said of the ejectment suits as a protection against prescription is, that they interrupted prescriptions *only as to the amount involved in those suits* and nothing more.

The balance of the decree $1,348.959 91, stands as a sum awarded against the city as a *punishment* for divers alleged torts, not committed as trespass to any realty, but strictly *personal wrongs* against the complainant *personally*, whereby she had a harder time in recovering her alleged realty from third persons and does not in any particular, represent *rents or profits*, and as *quasi offenses* and torts severally prescribed in one year from the date of commission, if ever committed. It would have been well to have dealt with this part of the decree in considering the plea of prescription. On this subject there is not a single word in the opinion.

The opinion next deals with the question of good faith and cites the cases of Gaines vs. New Orleans, 6 Wall. and New Orleans vs. Gaines, 15 Wall. as *res judicata* on that question. It is cheering to find that the doctrine of *res adjudicata* is not totally suspended in these cases, has not entirely fled the country.

It is doubtless true that this court did hold in the cases cited, that in fact and in law, Relf and Chew, as executors, under the will of 1811; the probate court that granted probate of that will; Mary Clark, put in possession of the estate by the probate court; Blanc, who purchased of Mary Clark, the universal legatee; the First Municipality that purchased of Blanc, and all who held under that chain of title, down to those evicted in the Monsseaux and Agnelly cases, knew that they were acting in flagrant fraud and that the estate with which they were

deviling was not theirs or the property of their nominal vendors, but belonged to Myra Clark Gaines.

If there could have been any doubt as to the guilty knowledge of the defendants in the Monsseaux and Agnelly bills, that doubt was solved by the decree of this same judge in these cases declaring that they and all of them had guilty knowledge of all of these things.

If this be the case as to all of those holding adverse to Mrs. Gaines how in the name of consistent justice can they be held to be liable to account to each other for any gains and profits resulting from this unholy deviling with the property of Mrs. Gaines? As well might a herd of thieves ask the courts to assist them to an equitable division of avowedly stolen property.

If it was the intention of the complainant to finally speculate on the relation between disseizors, she should have been less greedy in asking the courts to stamp out all honesty and good faith relation between her victims, those in possession and those who had at some prior time been in possession. She should have known that courts do not brand a class of people as rogues and then lend aid to distribute the fruits of the rognery denounced. It is as a matter of law, beyond doubt, immaterial whether the defendants in the Monsseaux and Agnelly suits, were insolvent or not, yet the issue was fairly made and it was the duty of the complainant to meet it with proof and the court with its view of its importance was bound to deal with the issue as an issue of fact in which the answer of the city must be overthrown. How was this done? The opinion states that there were "several hundred" defendants in these cases, and pauperizes them all by a simple reference to the depositions of *Florville Foy and Jules Vienne.* It is well to examine these potent depositions redolent of so much bankruptcy.

The deposition of *Florville Foy,* who had compromised with the plaintiff, is found on page 606, Vol. 1 of the printed record, as taken down, it is in the third person and all of the deposition relating to the solvency of the people in question, is the following :

"Witness says that he is acquainted with most of the de-
"fendants, possessors of property in what is known as the Blanc
"tract, against whom judgments were rendered in the cases of
"Gaines vs. Monsseaux et als., No. 3663, and Gaines vs. Agnelly,
"No. 6085, and that most of them are quite poor."

The deposition of *Jules Vienne*, is on page 607 of the same volume, all that he says on this subject is

"I am acquainted with a large number of the defendants in suits 3663 and 6085. Most of them are very poor." This is all of the proof on this issue, not an execution returned *nulla bona*. If the issue was material there was a failure of proof required by the issue made in the answer.

The important issue of *res judicata* in virtue of the former recovery in Gaines vs. New Orleans, 6 and 15 Wall., known in this record as suit 2695, is disposed of in the following unintelligible statement:

"The suit here referred to is known in this record as
"suit No. 2695. It was an ejectment suit conducted on the equity
"side of this court as a suit in part fordiscovery. It was filed
"originally with reference to the whole Blanc tract. The defend-
"ants' answer contained a disclaimer as to any title or possession
"of the tract, except that square upon which was situated the
"draining machine, and some other small pieces. The answer
"disclosed the names of the occupants who were alleged to be in
"possession of the rest of the tract.

"Upon the coming in of defendants' disclaimer, the com-
"plainant took no further proceedings as to the portion of the
"tract covered by it, and the cause proceeded and the judgment
"was with reference to the portion as to which possession was not
"disclaimed. *There was no judgment upon the disclaimer*, in fact *no*
"*issue was joined upon it*. The judgment has precisely the same
"scope and effect as if the bill as originally filed had sought a
"discovery and recovery of property and fruits as to the
"square occupied bythe draining machine alone, and the other
"squares not included in the disclaimer. Indeed after the dis-
"claimer it became necessary that the possessory actions against
"the occupants should be commenced and terminated before this
"action would lie" (sic). (Why the bill in that case was not amended and the actual occupants as disclosed in the answer of the city does not appear yet in the decree in this cause, the city is punished because the complainant did not amend.)

It seems impossible that this can be the text of the manuscript opinion. As a statement of law it is incomprehensible in

so far as it relates to the rule governing disclaimers in suits for possession and equity proceedings generally.

A moment's inspection of the record in 2695, would have prevented misstatement of the pleadings and issues, in that case. The disclaimer was embodied in and a part of the answer of the defendant corporation. The issue tendered by the bill in this particular was: first, possession of the Blanc tract; second, wrongful or unlawful possession. The disclaimer met the part of the bill charging the defendant with unlawful possession, by a denial of *any possession of any kind* as to the property included in the disclaimer tendering unambiguous issue. To this answer there was a general replication. The cause was heard at the circuit, and in this court upon these pleadings, and the proof taken in support of the issue. If this did not join issue on the disclaimer it is difficult to comprehend under the rule prohibiting special replication how issue can be taken on disclaimer in ejectment suits.

The plea of *res judicata* was certainly serious enough to be entitled to serious consideration, which it is manifest it did not receive. A moment's inspection of the report of J. B. Weller, master in the case 2695, would have shown the court that when that case was before the master, the complainant not only presented and urged a demand for rents and profits as to the portion of the Blanc tract disclaimed by the city, but also a claim for waste for cutting swamp cypress on the same lands; that both demands were rejected by the master, and the report confirmed passed to final decree, and was paid by the city.

Of that portion of the opinion relating to the reference of the cause to a master for final account before any issue of fact had been made, and before any answer came in as a punishment for the carelessness of a solicitor's clerk, there is no need of comment beyond the statement that, as a treatise on equity procedure, it is surpassed in singularity and novelty only by the practice sought to be justified. Such a course was never resorted to before in an equity cause, and probably never will

be imitated. The reference had a language probably not intended by the court, and was read by the defendant as a final decree before any issue had been tendered the court for trial.

Any course of practice which is out of its regular order, extraordinary in character, and which may create the impression of pre-judgment, most certainly ought to be avoided at least in a case of large public interest, the result of which must affect a large community and operate on the public credit of a large municipality.

Beyond doubt, there was no intention to do any wrong; yet the course was wrong and irregular beyond precedent, and necessarily created much public excitement.

So much of the opinion as relates to the exception to the master's report taken by the defendant, indicates that the court did not deal with the real issues of law and fact tendered by the exceptions, and gave only passing notice to comparatively immaterial and secondary matters involved.

In considering whether the complainant ought to recover on the pleadings and proofs, the doctrine of *res judicata* is again revived into life. The status of the complainant and her title to the succession of Clark, are declared settled by the decree in Gaines vs. New Orleans, the former suit between the same parties, (2695.) As amatter of estoppel this is doubtless correct. But why should the estoppel stop there, that bill being a bill for ejectment from the *entire Blanc tract* and *for all rents and profits* due from the city of New Orleans for its torts, wrongful disseizin and occupancy of the Blanc tract? Why was not that question *res adjudicata* also? Why was the resurrection partial only?

As law to support his decree, the judge says:

"Under the civil law and the textual provisions of our "code the seller, even in good faith in case of eviction, is bound—

"1st. For a restitution of the price;

"2d. For a restitution of all profits and revenues which the "vendee is obliged to restore to the owner;

"3d. For all costs; and

"4th. For all damages which the vendee has suffered besides "the price paid. Civil Code, Arts. 2506. 2507, 2510; Morris vs. "Abat, 9 La. 352; Downs vs. Scott, 3 Ann. 278."

Suppose this to be the law of Louisiana, correctly stated, of what avail is it to support the decree? Mrs. Gaines never held the position of *vendee* of the city. She has not been evicted. She was never compelled to *restore* price or profits to her *evicted vendees.*

No *evicted vendee* of any person or corporation is before the court asking restitution for price or any other demand growing out of eviction.

The same judge in the same opinion had declared that there *is no privity between Mrs. Gaines and the defendants* in the new ejectment bills concerning *these claims* or supposed claims against the city growing out of the express or implied warranty involved in the sale of realty.

Mrs. Gaines did not dare claim the rights of the vendee by transfer or assignment. If she had done so, she would have ousted the court of jurisdiction: 1st, because the claim of the evicted against their predecessors in possession is strictly a *claim at law*, and alleged to have been liquidated in amount by solemn adjudication before the complainant's bill was filed; 2d, the claim, if a demand in any sense, is at best only a *chose in action*, not negotiable by law merchant. Therefore, unless the evicted could sue in the federal court, Mrs. Gaines could not. The bill not only does not show the evicted competent to sue in the circuit court, but on the contrary all of the averments of the bill are inconsistent with that condition of the evicted.

It is impossible to comprehend what interest Mrs. Gaines had in the law governing the relation of vendor and vendee of real estate, when she stood on the record distinctly disowning either character, and is declared to be a stranger to that relation concerning any vendors or vendees of the Blanc tract, and in fact had obtained decree after decree declaring that there had been and could be no lawful or good faith vendors or

vendees of the property between parties owning possession adverse to her.

The reference to authority in support of the decree in this particular is also to a certain extent unhappy. The first case cited is Morris vs. Abat, 9 La. 352 (should be 552). This was a case between a vendor and vendee of realty. The vendee was evicted and brought action on the warranty of title. The court, Martin, Justice, gave construction to what was then Art. 2482 of the Louisiana Code, and is 2406 of the present code the article cited in the opinion. Just prior to the date of that decision, the code of 1808 had been repealed, and the code of 1825 substituted. The code of 1808, in Art. 57, had enacted: that "*if the thing sold had risen in value at the time of eviction, even without the aid of the buyer, the seller is bound to pay him the increase of value above the price of sale.*"

The evicted sought to recover damages under this provision of the old code. Martin, Justice, held that this article of the old code was rejected from the new code because the jurisconsults who compiled the new code thought the article dangerous in a new and growing country where the price of realty naturally advanced rapidly.

On page 557 of the report he says:

"This article of the old code, which imposed such fearful "responsibility on the seller, was accordingly suppressed, and "does not appear in the new one. The vendor's liability is "now clearly defined, and placed upon the most equitable foot-"ing. He is now only responsible for the price at which he "sold; for the fruits or revenues, where the party evicted has "restored them to the true owner; the costs of the suit of "eviction and warranty, and for any damages the vendor has "had to pay. See *Louisiana Code*, Art. 2482.

"To say that the word *damages, means* the loss of profits "not made, or to be responsible for the augmentation of the "value of the thing sold at the time of eviction, beyond the "price of the original sale, would be to restore and carry into "effect the entire provisions of the article in the Civil Code "which the legislature intended to suppress and repeal. It "would, in fact, reinstate the article of the former code, which "was recommended by the jurisconsults to be suppressed, and "which was formally suppressed and repealed on the adoption "of the Louisiana Code."

Downs vs. Scott, 3 Ann 278, simply affirms Morris vs. Abat. The articles of the Civil Code and cases cited, refer solely to the relation between vendor and vendee, not, as in this case, a supposed relation between an alleged vendor and strangers to the contract of sale.

After a statement of a portion of the litigation in which, with the single case of *Fuentes vs. Gaines*, Mrs. Gaines was the *plaintiff*, the opinion states :

"That this is a fault of an aggravated character, the perpe-
"tration of which has been persisted in beyond all precedent,
"cannot be doubted. Civil Code, Arts. 2315-2324; Irish vs.
"Wright, 8 Rob. 428-432; Smith vs. Berwick, 12 Rob. 2025."

Whether these authorities are cited in support of the statement of fact does not appear. The citations neither support the fact stated or any proposition of law pertinent to the controversy.

Art. 2315 C. C. is a general proposition: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." If this article had the range of construction sought to be given it in the opinion, it would make judges responsible for erroneous judgments, and dispose of all possibility of cases of *damnum absque injuria*. The same rule obtains in common law, subject to the same limitations and construction.

Art. 2324 C. C. enacts: "He who causes another person to do an unlawful act or assists or encourages in the commission of it, is answerable *in solido* with that person for the damage caused by such act."

This rule is the same at common law, and relates as well to liability for damages as liability to punishment by indictment. The act must be an "*unlawful act.*" Since when has it been unlawful for a defendant, when sued, to defend under and through the forms and means provided by law for that purpose?

But suppose the acts complained of were improper or even unlawful, since what date has equity taken to punishing naked

torts under the pretense of redress denominated *rents and profits* due to the party found to have suffered personal wrongs?

We apprehend that to make these articles of the Louisiana Civil Code applicable to this case both articles should be amended so as to further state, "*and such damages shall be recoverable in equity,*" and the constitution of the United States so changed as to accommodate itself to the Louisiana Code in that particular.

We have examined all of the cases cited in support of damages for the use of judicial process and find in all the parties punished for wrongful use of judicial process have been *plaintiffs* in the litigation complained of, as have spirited property against which writs have been directed out of jurisdiction, with intent to defeat the writ. None of the cases *are in equity.* Nor have we been able to find a single case where a *defendant*, when brought into court by a plaintiff, has been held liable in damages for defending in court or enlisting aid to assist in making a legitimate defense.

The opinion cites what are termed "civil law" authorities, while in no manner pertinent to any questions involved in the controversy, it is time that it is understood that there has been no civil law in Louisiana, if by civil law is meant the law once in force in the Roman territory, or now or at any time in force on the continent of Europe or elsewhere. The only authoritative law in lawful force in Louisiana is *statute law.* The very first article of the Civil Code defines law to be "*a solemn expression of legislative will.*"

Not only would it have been impossible for the state to have adopted any general system of laws, as has been the case in most other states with the common law of England, but for a period longer than the range of this controversy, such adoption has been and still is prohibited by the constitution of the state. The reason for such inhibition is manifest. All of the countries in the civilized world where the common law does not prevail have codified a statute law or its equivalent, and if adopted as a

system would interfere with the general form of state government, republican in form, and in most cases with freedom in matters of religion.

It is enough to say that all of the reasoning in this portion of the opinion and the authorities cited from all sources relate to the case of litigation between the party claiming title and the disseizor who was or had been in possession and did or could have made the property yield revenue, which when yielded would have gone into *the coffers* of the disseizor and not into the hands of third persons stated in the bill to "unknown," "dead" or "insolvent," not one of whom is named or described in the bill and between whom and the city there was no privity of contract or possibility of account.

If all the denunciation of the city so unlimited in the opinion is true, if the liability is as stated, the city of New Orleans or rather the first municipality, was not the first disseisor. The probate court that probated the will of 1811, now judicially declared to have acted in fraud with guilty knowledge of the rights of Myra Clark Gaines, effected the first disseisin in putting Relf and Chew in possession of the succession as executors, again in putting the alleged maternal grandmother in possession as universal legatee of her son. If courts are not protected from action for deliberate wrongs committed, and there is no prescription under the doctrine of that opinion, the heirs of the judge of that court are responsible in despite of the rule that actions for *torts* do not generally survive, because this, according to the doctrine of the opinion, is not an action for *tort* but for the restoration of rents and profits avowedly never received yet an obligation *ex-contractu* which by fiction adheres to the estate of the deceased, at least we can reach no other conclusion from the text of the opinion.

If we give Relf and Chew, the executors, and the court that appointed them and put them in possession of the estate, absolution, by reason of their public or *quasi* public position, the first disseisor claiming title was the alleged *maternal grandmother*

of the complainant, Myra Clark Gaines. The courts have stamped her with guilty knowledge that she was robbing her grandchild. She "ought to have known and did know," that the estate belonged to her grandchild and that she was selling her grandchild's patrimony to Evariste Blanc when she conveyed to him. He was also a rogue and knew that he was deviling with the patrimony of an orphan. It has been so adjudged therefore, if this action lies against the city it also lies against Mary Clark, or her succession; Relf and Chew, or their succession; Evariste Blanc, or his succession; as well as against all of the "unknown" subsequent transferees of the property or any part of it. This is too monstrous to be entertained for a moment. The full measure of responsibility of any of these disseisors *to the complainant* is to account for the period during which they respectively held adverse possession. With the relation of the disseisors to each other, the complainant had no concern in law nor did she get any assignment that she could assert, either in equity or in the federal courts having jurisdiction in Louisiana.

APPENDIX.

Compilation of alleged decrees in Monsseaux and Agnelly bills.

GAINES *vs.* MONSSEAUX *et al.*

Original decree, vol. iv. page 3784, with special decrees against Jules Bermudez, Louis Bermucerosseles, Pierre Bordes, Joseph Balzac, Jean Balzac, Philip Avegno, Felix A. Ducros, Jules Abadie, the City of New Orleans, (a Lot in Municipality No. 2), not on Blanc tract, Joseph Abadie, Simeon Brunett, Joseph Despeaux, Joseph Fuentes, A. B. Griswold, Maria P. Gravier, John L. Gubernator, Hope Insurance Company, Felix M. Jacob, Widow Auguste Lanuse, Jules Lavergne, George Lohr, Michel Lorenz, Wm. H. McLean, Paul H. Monsseaux, Mrs. S. Magner, Pierre Minnerville, J. P. Percy, Mrs. Oscar P. Peyreaux, and her vendee, Jules Cassard, E. Parocell, H. Spitzfadden, Mrs. W. J. Saliba, Jean Sauvage, Alfred Rousseaux, Geo. O. Renickie, Nancy Villars, Alban Soulié, Mrs. J. C. de St. Romes, Mrs. E. Vance, Mrs. E. N. Rileaux, Albin Rochereau, Southern Star Manufacturing Company, Joseph Sabates, Martin Soye, Raymond Rouselot, J. P. Patrick, Paul Pesquier, Jacob Newhauser, Louis E. Nee, Louis Mestier, Heirs of Macarty, Mrs. Septima Morel and husband, Christopher Morel, Henry Larque, Francois G. Levasseur, Jules Lapene, Mrs. Josephine Leduc, Joseph Hernandez, Mrs. J. V. Gourdain and husband, August Gautier, M. Graft, Anne Gautier, Florville Foy, John and Pauline Bietry, P. Avril, J. Dupas, Mrs. Simeon Delord, Joseph Diard, Daniel Oechsner, Edward Burnett, Louis Burnett, George Bischoff, Jean Despeaux, Michel Meilleur.*

*NOTE—This decree and the general decree in the Agnelly case are not given in full on account of their length; the names of the defendants on Blanc tract, against whom there are decrees, are given.

(Printed Record, 2913 and 2914, vol. iv.)

Pro Confesso against Widow Durocher et als.

Extract from the Minutes, June 22d, 1877.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX *et als.*
No. 3663.

In this case on motion of Wm. Reed Mills, solicitor for complainant, it is ordered that the bill of complaint filed in this
5015 cause be taken *pro confesso* against the defendants named for want of demurrer, plea, or answer, they having been duly served with subpœna: Widow B. Durocher, Julian Dumont, Victorine Demoruelle, R. Devoe, Nicolas Darmas, Pierre Lanabère, Widow William Laurens, Widow Raymond Losel, Jacques P. Moreau, Barthelemy Morrero, Margaret McLaughlin, L. J. E. Maco (Dufilho, Lafitte & Co., agents), McDonough School Fund, J. B. Muilke *alias* Mailke, Adèle Mougin, Mrs. J. E. Maimsous and husband, John Miller, Sqr., 2520.

(Printed Record, vol. iv, 2914.)

Order for Referring Cases to E. Sabourin, Master.

Extract from the Minutes, June 22d, 1877.

Marked X, U. S. C. C., No. 8825, offered by Complainant.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX *et als.*
No. 3663.

On motion of Wm. Reed Mills, solicitor for complainant, and on representing to this court that by a decree rendered on the 28th day of March, 1872, against certain defendants therein, and against whom *pro confesso* had been taken, viz.: Joseph Beauduc, Jules Bauduc, J. A. Blacksmith, Widow Pierre Cop, Canal Carondelet Company, Joseph Dangel, Joseph Dubuc, Jno. Hoey, J. B. Jacquett, Wm. Moran, Stanislaus Weber, Mrs. E. Walton and husband, Henry Grammont, John Miller, J. C. Pelhoffer, [and that by an order of said court the same was

referred to John B. Weller, a master in chancery at the time, to determine the boundaries of the portions of the said property held by the said defendants, with the rents and revenues thereof, etc., and on further representing to the court that the said master did, in pursuance of said order, file in this court his report determining the boundaries of the properties of each of said defendants, but that before completing his report as to the rents and revenues of said properties, he died:

It is therefore further ordered, adjudged and decreed, that the matter be referred to E. Sabourin, Esq., master in chancery of this court, to ascertain the rents and revenues thereof,
5016 he giving notice to said parties of the time and place at which he will proceed to the said examination, and that the complainant have execution against the said defendants for all such costs as she may have incurred in their behalf in this cause.

NOTE—I am unable to find the decree *pro confesso* referred to. This decree is not a decree of ouster, and is not signed by any judge of the court, and of course no decree.

(Printed Record, vol. iv, p. 3987.)

Judgment of Pro Confesso against certain Defendants.

Extract from the Minutes, November 5th, 1877.

MYRA C. GAINES
vs.
P. H. MONSSEAUX *et als.* } No. 3663.

On motion of Wm. Reed Mills, solicitor for complainant, and on representing to the court that the following defendants having failed to answer within the time allowed by order of this court:

It is ordered that judgment *pro confesso* be entered up against the following, viz.: Alex. M. Agelesto, Felicite
5110 (Fellete) Bouseigneur, Marceline Bethencourt, Simeon E. Brunette, J. F. B. Pegot, Armand Banranco, Jean Cazeau, J. F. B. Courbet, Mrs. Charles Havelard, Wm. Hogan, Julia

Reny or Keny, Mrs. Ellen Kelly, Henry Laurens, Isadore E. Pinsard, Mrs. Ellen Phillips and husband, Henry Peter, Fanchon Randon, Mrs. Celina Ravenet, Henry St. Armand, J. P. Siffert, Jeremiah Scanlan and wife, Wm. R. Morrison, Joseph Guillot, Mrs. J. F. Lafarge, Joseph Dubuc.

Decree Confirming Pro Confesso of June 22d, 1877, against Certain Defendants, marked X in 8825, U. S. C. C. offered by Complainant.

Extracts from the Minutes, November 13, 1877.

MYRA C. GAINES)
vs.) No. 3663.
P. H. MONSSEAUX *et als.*)

On motion of Wm. Reed Mills, solicitor for complainant in the above entitled and numbered cause, and on representing to the court that heretofore, in the April term of this court, on the 22d June, 1877, judgments *pro confesso* were taken and entered against the following defendants in this said cause, Widow B. Duroscher, Julian Durand, Victorine Dumonville, R. Devoe, Nicholas Damus, Pierre Lamathies, Widow Wm. Laurens, Widow Raymond Locoul, Jacques P. Moreau, Bartholomew Morero, Margaret McLaughlin, L. J. E. Mace, McDonogh School Fund, J. B. Mailhe, *alias* Maelke, Adele Mengén, Mrs. J. B. Mengen, and that no appearance, demurrer, plea, or answer have been filed by any of said defendants:

It is now ordered and decreed that said judgments *pro confesso* be now, and the same are hereby, confirmed. And it is further ordered that E. Sabourin, master in chancery, be further authorized and ordered to report to this court the respective properties belonging to complainant in possession of said defendants, both as [to] the metes and bounds and as to the amount of fruits and revenues and value for use due by said respective defendants to said Myra Clark Gaines, complainant.

(Signed) EDWARD C. BILLINGS, *Judge.*

NOTE.—No decree of ouster or ejectment.

(Printed Record, vol. v, p. 4740.)

Decree Confirming Pro Confesso. Entered and Filed June 20th, 1878.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX *et als.* } No. 3663.

This cause came on to be further heard at this term on the motion of solicitor of complainant to make absolute the decrees *pro confesso* entered at the November term, 1877, and filed on 5th November, 1877, then taken against Alex. M. Agelesto, Felicité (Felelle) Bonseigneur, Marceline Bethencourt, Simeon E. Brunette, J. F. B. Begot, Armand Bauvance, Jean Cazeau, J. F. B. Coubert, Mrs. Charles Haveland and husband, Wm. Hogan, Julia Reny or Keny, Mrs. Ellen Kelly, Henry Laurens, Isidore E. Pinsard, Mrs. Ellen Phillips and husband, Henry Peter, Fanchon Rendon, Mrs. Celine Ravenet, Henry St. Armand, J. P. Siffert, Jeremiah Scanlon and wife, Wm. R. Morrison, Joseph Gillot, Mrs. J. F. Lafarge, Joseph Dubuc, and considering the articulations in said bill of complaint, and the matters therein contained and set up, and the said decrees of *pro confesso:*

It is now ordered, adjudged and decreed, that as against said defendants, and so far as the property described in said bill of complaint is concerned, to-wit: 1st. A certain tract of land containing about 135 acres, more or less, situated in the 5980 quarter of Bayou St. John, in the City of New Orleans, with all the buildings and improvements thereon, bounded by Canal, Carondelet, Dorgenois, and Bellechasse streets, by land, that in 1821 was owned by Messrs. Henry and Evariste Blanc, and by the Bayou St. John, according to a plan of said lands drawn by Joseph Pilié, dated August 20th, 1821, annexed to an act of sale made by Richard Relf and Beverly Chew, as executors of Daniel Clark, to Evariste Blanc, and passed before Philip Pedesclaux, October 30th, 1821, now of record in said Pedesclaux, notarial records, said land having been acquired by Daniel Clark in his lifetime from Nicolas Marie Vidal by act

before C. Ximenes or Pedesclaux, notary public, on or about July 24th, 1804.

2d. A tract or parcel of ground on the Gentilly road, in the City of New Orleans, lying between the Gentilly road, the Canal Marigny, Treasure, and both sides of Spain streets, having about 22 arpents fronts on Gentilly road, as by plan of Allon. D. D'Hemecourt, dated April 21st, 1856, at the filing of this bill, in the office of H. D. Stone, 18 Royal street, New Orleans.

3d. A tract of land lying and being in the City of New Orleans, bounded by Dorgenois and Bellechasse, or part of St. John street, the Bayou St. John, St. John route, and Gentilly road, and particularly described upon a plan of said land made by Lafon, and deposited in the office of P. Pedesclaux, notary public, June 9th, 1809, which land was acquired by the said Daniel Clark from Nicolas Maria Vidal by an act in the office of L. T. Caire, notary public, June 24th, 1804, and from Louis Antoine Blanc, by act before Wm. Christy, January 25th, 1805, and others in July 15th, 1807, August 22d, 1809, and July 23d, 1807, the said bill to be taken and held confessed and true, and that the said Myra Clark Gaines, complainant in this cause, is the only legitimate child of Daniel Clark in the said bill and proceedings mentioned, and as such was exclusively invested with the character of such legitimate child, and entitled to all the rights of the same, and that under and by virtue of the last will and testament of the said Daniel Clark, the said Myra
5981 Clark Gaines is the universal legatee of said Daniel *Daniel* Clark, and, as such, entitled to all the estate, whether real or personal, of which he, the said Daniel Clark, died possessed, subject only to the payment of certain legacies therein named, and especially is she entitled to all the rights of the said Daniel Clark at the time of his death, and in her said capacities to the property hereinbefore described, and any and all such portions thereof as the said defendants hereinbefore named, or either or all of them, may have been in the possession of at the time of the filing of this bill of complaint, to wit, the 22d No-

vember, 1865, or at any time since; and it is further decreed that this matter be referred to Ernest Sabourin, Esq., a master in chancery of this court, to determine the boundaries of the portions of the said property held as aforesaid by the said defendants, with the rents and revenues and value for use thereof, he giving notice to said parties of the time and place at which he will proceed to the said examination; and it is further decreed that the complainant have execution against the said defendants for all such costs as she may have incurrred in their behalf in this cause.

It is further ordered that as to the rights of complainant for rents, revenues, and value for use, she is entitled to all the income, revenues, profits, and value for use and occupation which the evidence before the master shall establish, she, as owner, would have received or derived whether the possessors had realized them or not, and whether the failure *on* said possessors to realize them resulted from not managing the estate with ordinary prudence, or from the estate remaining unproductive by reason of the title thereto being in dispute on account of a claim of title on the part of the possessors now adjudicated to have been unfounded, the proof must establish that if the complainant had been left undisturbed in the possession of this property which she has now recovered, by ordinary good management she would have caused the property to produce the incomes which are to be adjudged to her.

NOTE—Decree never signed or enrolled.

(Printed Record, vol. v, p. 4852.)

Entry at Rules.

Extract from Chancery Order Book, January 6th, 1879.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX *et als.* } No. 3663.

On motion of Wm. Reed Mills, solicitor for complainant, and it appearing that process of subpœna has been served upon

the defendants herein named, to-wit: Widow Paul Leibell, Charles Lorenz, Amelia Lorenz, Magdaline Lorenz, wife of Charles Ebert, and Charles Ebert, Henri Carriere, Edgar Lacroix, Simeon Hernsheim, Mrs. Adeline Guesnon, Widow of P. H. Monsseaux, and John and Pauline Bietry, and that they have failed to enter their appearance or to demur, plead, or answer to complainant's bill of revivor and supplement within the legal delay, it is ordered that said bill—taken *pro confesso* against the said defendants.

(Printed Record, vol. v, p. 4928.)

Decrees on Pro Confesso against Heirs of Michael Lorenz, Edgar Lacroix, Henri Carriere, Simeon Hernsheim, and Mrs. P. H. Monsseaux. Entered and Filed March 21st, 1879. Marked LXXXI, U. S. C. C., offered by Complainant. No. 8825.

MYRA CLARK GAINES *vs.* P. H. MONSSEAUX *et als.* } No. 3663.

This cause came on to be further heard at this term on the motion of counsel for complainant to make absolute the decree of *pro confesso*, entered at the January rules of 1879, and filed on the 6th of January, 1879, then taken against Widow Paul Leibel, or Zeibel, executrix of the estate of Michael Lorenz, Charles Lorenz, Magdaline Lorenz, wife of Charles Ebart, her husband, and Amelia Lorenz, who has been emancipated by judgment of the second district court for the parish of Orleans, on the 23d February, 1877, heirs of Michel Lorenz, deceased; Edgar Lacroix, sole heir of Francois Lacroix, deceased; Henri Carriere, John Bietry and Pauline Bietry, his wife; Simeon Hernsheim and Mrs. Adeline Guesnon, widow and sole testamentary and universal heir and legatee of P. H. Monsseaux.

And considering the articulations in the bill of revivor and supplement filed in this honorable court on the 23d April, 1878, to the original bill filed as on the 22d day of November, 1865, and the matters therein in said bill contained and set up, and the said subsequent decree, of *pro confesso*:

It is now ordered, adjudged and decreed that all the property described and claimed by the defendants, Widow Paul Leible, or Zeible, executrix of the estate of Michael Lorenz, Charles Lorenz, Magde- * * * * *

NOTE—This decree is signed and is in the same form as original decree.

Decree against W. H. McLean is on page 4933, vol. v, and is in the usual form signed.

(Printed Record, vol. v, p. 5135.)

Pro Confesso against Certain Defendants.

Extract from Minutes, June 9th, 1879.

MYRA CLARK GAINES *vs.* P. H. MONSSEAUX *et als.* } No. 3663.

On motion of Wm. Reed Mills, solicitor for complainant, and on suggesting to the court that the following named defendants have neglected to file answers, pleas, or demurrers to the said bill of complaint and to make full discovery, it is ordered that said bill be taken *pro confesso* against Mrs. J. C. de St. Romes as to square 43, bounded by Lopez, Salcedo, St. Peter and Orleans; also 10 lots in square 16, bounded by St. Phillip, Bellechasse, Dumaine, Gayoso and Dupree; L. Atenet, square 15, bounded by Salcedo, Gayoso, Dumaine and Bellechasse; J. B. Robertson, lots 12 and 13, in square 20, bounded by 6366, Broad, Dorgenois, Dumaine and St. Ann; Mrs. Michel or Micher Mulier, square 30, bounded by Hagan Avenue, Lopez, Orleans and St. Ann; Francis E. Nee, lots 17 and 18, in square 37, bounded by Dorgenois, Broad, Orleans and St. Ann, and that the same be referred to E. Sabourin, master in chancery, to ascertain and determine as to the possession of said described property by said defendant Mrs. J. C. de St. Romes, and as to amount of fruits, revenues, and value for use of the same while in said defendants' possession.

NOTE—This is a remarkable instance of order *pro confesso* and final decree combined (not signed).

(Printed Record, vol. v, p. 5242.)

Bill taken Pro Confesso for want of Demurrer, Plea, or Answer.

Entry in Chancery Order Book June 5th, 1871.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX *et als.* } No. 3663.

In this case, on motion of Rice, Foster & E. T. Merrick, of counsel for the complainant, it is ordered that said complainant's bill be taken *pro confesso* for want of demurrer, plea, or answer, against Louis Aron, P. Augrain, and wife, Jos. Banduc, Jules Buduc, J. A. Blockworth, Louis Binoche, Widow Pierre Cap, Carondelet Canal & Navigation Company, Joseph Danzel, Felix A. Ducros, Joseph Dubuc, Joseph Diard, J. Dupasse, Michel Dennis, N. P. Fisher and wife, Aug. Fuentes, Hy. Grandmont, John Hoey, H. D. Hopkins and wife, C. W. Hopkins, S. Howell and wife, J. B. Jacquet, Widow Aug. Lanusse, Heirs of Lavergne, Henry Lazeur, Wm. Moran, John Miller, Louis E. Nie, J. C. Pelhofer, Hy. Parlange, Pontchartrain
6476 Railroad Co., P. G. Reasor, Antoine Surrat, Hy. Spitzfadden, Martin Soy, Mrs. Suliba, adm'r; Stanislas Webber, Mrs. C. L. Wolton and her husband, Mrs. Palmyra White and George White, Attree White, Octavia White, D. P. White and A. Miltenberger.

Bills taken Pro Confesso for want of Demurrer, Plea, or Answer.

Entry in Chancery Order Book, June 5th, 1871.

MYRA CLARK GAINES
vs.
P. G. AGNELLY *et als.* } No. 6085.

In this case, on motion of Race, Foster & E. T. Merrick, of counsel for the complainant, it is ordered that said complainant's bill of complaint be taken *pro confesso* for want of demur-

rer, plea, or answer against Edmund Abel, Juan Alphonso, Joseph Alseredo, Emile Bouny, M. A. Bramon, Charles Beaumont, Pierre Bordes, Francis Coquet, Jean Carembert, Robert C. Cleburne, Mrs. H. Chipley, Chavenette Chauvin, Aristede Carlon, Chas A. Carrier, Jean Buzeon, Widow R. Brongier, J. Bures, Mrs. V. Bertonviere, J. B. Bergeron, adm'n'r Widow J. B. Bergeron; Pierre Cazenave, Francis Carriere, A. Catalongue, Antoine Chauvin, Manuel Custeen, J. M. Crawford, Ovid Dubuys, Chas. Dantonnelle, Chas. Demarist, Wid. Everard, Mrs. F. J. Forstall, Lucien Foucire, August Fouchert, Jean Frideau, J. E. Gabaroche, Edmund Guillet, Jean R. Gaudam, Widow James Gallagher, Auguste Gautier, Joseph Guerero, John Heaver, Louis Hortentein, O. E. Hall, H. D. Hopkins, Prosper Howard, Matthias Herde, Henry F. Hall, Leopold Hoislett, J. W. Harrison, W. Harrison, Dr. J. A. Henson, Jules Hottier, Wm. Hardgroden, P're Jourdainx, Gottsfried Jacobi, J. Ivegrette, Jean M. Journes, Louis Janeum, Heirs of Mrs. E. E. Jackson, W. H. Johnson, Jean J'l Klau, Bay Kidder, J. B. Kidder, Chas. Lewis, J. R. Lee, Charles Lesseps, Jean Lavie, Joseph Lettrie, Wm. R. Lecul, Wm. Alex. Laury, Joseph Lobot, Eululie Leffetson, J. P. Maglish, Minor A. Meunier, Theodore Marero, Marius Mullier, Joseph Modson, Mrs. Melchior Michel, Jacque Marque, Isaac Majerada, Mr. John Morates, Jacques Muller and wife, Joseph Monton, V. M. Murphy, Mrs. Chas. Matthews, David B. North, John Nauman, Francis Nye, Felix Pitchut, D.
6447 Pony, H'y Peychaud, Maucelm F. Pecora, Joseph Prosper, M. A. Peyroux, Victor Perrilott, F. Pichoux, Joseph Pierre, Wm. Robert, Felix Robin, Louis Royer, Jacob Rodriques, Jno. Remele, A. Rechard, Mrs. A. F. Richards, Richards & Marsh, Jean Raza, Joseph Robins, Peter St. Amant, C. C. Sampson, Bernard Saux, Wm. Sommen, Lewis Sengi, J. Segrest, B. Saloy, J. Secrementaro, E. H. Singleton, Thos. Singleton, A. L. Tissot, Jos. Torregano, Mathilda Thean, Joachim Viosca, B. O. Vignaud, Thomas Wiltz, L. Ventrel, Jno. Wiltz, Mrs. Chas. Walshe, Anna Williams, Madeline Wiltz.

(Printed Record, vol. v, p. 5253, et seq.)

6488. Bills taken Pro Confesso for Want of Answer.

Entry in Chancery Order Book, January 15th, 1872.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX *et als.*
No. 3663.

On motion of J. Q. A. Fellows, solicitor for complainant, and on showing that the following named defendants herein have failed to make answer to the bill of complaint within the extended time allowed them at their request and by order of court, or to ask for or obtain any further extension of time within which to answer or make further plea, to-wit: B. Abadie, Jos. Bormond, V. Demourelle, M. Esnard, I. S. Gubernator, A. B. Griswold, Gabriel Levasseur, I. T. D. Lefebre, M. Meilleur, Jr., C. Morel, Pierre Minveville, Geo. O. Reinecke, Jean Sauvage, Widow and heirs of Paul Pesquier, Louis Mestier, J. A. Blanc, Geo. Bischof, City of New Orleans, S. Delord and wife, Joseph Fuentes, Theo. Guyot, F. M. Jacobs, Thos. Lacroix, Henry Larquie, F'rs Mouney, Mrs. S. Magner, Raymond Roussoulot, Widow J. C. de St. Romes, F. Thompson, Minor Kenner, M. A. Levasseur, Jos. Keating, P. Wecker, Jules Bermudez, Owen Doherty, I. Despoux, Florville Foy, J. Guillotte, Jules Lapene, Jules Lavergne, D. B. Macarty, Mrs. S. Morel and husband, P. H. Monsseaux, M. Rillieux, Albin Soulé, W. F. Vredenberg, Michel Lorenzo, Widow R. Massena, Mrs. Vance, Alaphouse Drez.

It is ordered that the allegations of said complainant's bill be taken *pro confesso* as to each of the above named defendants.

Bills taken Pro Confesso for Want of Answer.

Entry in Chancery Order Book, January 15th, 1872.

MYRA CLARK GAINES
vs.
P. F. AGNELLY *et als.*
No. 6085.

On motion of J. Q. A. Fellows, solicitor for complainant, and on showing that the following named defendants have failed

to make answer to the bill of complainant within the extended time allowed them at their request and by order of the court, or to ask for or obtain any further extension of time within which to answer or make further plea, to-wit: City of New Orleans,

6489 Wm. Chambers, Robertson, Thomas, Jos. Keating, Ebbert-ing, Geo. B. executors of Josiah Cole, P. Brunet, E. A. Minturn *alias* Dauphin, M. Meilleur, M. Elliot, Mrs. J. V. Gottschalk, Jean Ollie, Rudolphe Rousseaux, V. de St. Romes, J. B. Slawson, P. S. Wiltz, Widow J. C. de St. Romes, Dusnan de la Croix, it is ordered that the allegations of said bill of complaint be and they are hereby taken *pro confesso* as to each of the above named defendants.

(Printed Record, vol. v, p. 5294.)

6525. *Bill taken as Confessed Against Certain Defendants.*

Entry in Chancery Order Book, January 6th, 1879.

MYRA CLARK GAINES
vs.
P. F. AGNELLY *et als.*
No. 6085.

On motion of Wm. Reed Mills, solicitor for complainant, and it appearing that process of subpœna has been served upon the defendants herein named, to-wit: Amelia Leonde Macarty, wife of Theophile Imbert; Anne Louise Macarty, widow of Dranson B. Macarty; Laura Louise Macarty, wife of H. St. Armaud; Colois Henry Macarty, and that they have failed to enter their appearance or demur, plead or answer to the complainant's bill of revivor and supplement within the legal delay, it is ordered that said bill be taken as confessed against the said defendants.

Bill taken as Confessed Against Certain Defendants.

Entry in Chancery Order Book, January 6th, 1879.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX *et als.*
No. 3663.

On motion of Wm. Reed Mills, solicitor for complainant, and it appearing that process of subpœna has been served upon

the defendants herein named, to-wit: Widow Paul Leibell, Charles Lorenz, Amelia Lorenz, Magdaline Lorenz, wife of Chas. Ebert; Henri Carriere, Edgar Lacroix, Simeon Hernsheim, Mrs. Adeline Guinon, widow of P. H. Monsseaux, and John and Pauline Beitey and Chas. Ebert, and that they have failed to enter their appearance or to demur, plead or answer to the complainant's bill of revivor and supplement within the legal delay, it is ordered that said bill — taken *pro confesso* against the said defendants.

Bill as Confessed against Mrs. E. W. Glenny and I. E. Glenny, her husband.

Entry in Chancery Order Book, March 5th, 1880.

MYRA CLARK GAINES
vs.
P. H. MONSSEAUX *et als.* } No. 3663.

On petition revivor.

On motion of Wm. R. Mills, solicitor for the complainant herein, and it appearing that the defendants herein, Mrs. Emma Walton Glenny, and Isaac E. Glenny, her husband, have been respectively, duly served with process of subpœna, and have failed to enter their appearance to the said complainant's bill of revivor within the legal delays, it is therefore ordered that the said bill of revivor be, and the same is hereby, taken as in all matters and things confessed by the said defendants.

GAINES *vs.* AGNELLY.

(Printed record, vol. vi, p. 5609.)

Pro Confesso as to Certain Defendants.

Extract from Chancery Order Book, Monday, June 5th, 1871.

MYRA CLARK GAINES
vs.
P. F. AGNELLY *et als.* } No. 6085.

In this case, on motion of Race, Foster & E. T. Merrick, of counsel for the complainant, it is ordered that said complain-

ant's bill of complaint be taken *pro confesso* for want of demurrer, plea or answer, against:

Edmond Abel,
Joseph Alsesedo,
Gregoire Alsesedo,
Emile Bouny.
M. A. Bramon,
Ch's Beaumont.
Pierre Bardes,
Francis Coquet,
Jean Carambert,
Robt. C. Cleburne,
Mrs. H. Chipley,
Chavenette Chauvin,
Aristide Carlon,
Charles A. Carriere
Jean Bazeon,
Wid. Everard.
Mrs. F. J. Forstall,
Lucien Foncire,
Auguste Foucher,
Jean Frudeau,
J. E. Gabbaroche,
Edward Guillet,
Theodore Marero,
Mrs. Melchoir Michel,
Mrs. J'n Morales,
V. M. Murphy,
John Nunan,
D. Powy.
Joseph Prosper,
F. Pichon,
Felix Robin,
John Remele,
Mrs. A. F. Richards,

Wid. R. Brugier,
J. Bures,
Mrs. V. Bertonier,
6729c J. B. Bergeron,
J. B. Bergeron, adm'r,
Wid. J. B. Bergeron,
Pierre Cazanave,
Francis Carriere,
A. Catalongne,
J. M. Crawford,
Antoine Chauvin,
Manuel Custeen,
Ar. de Buys,
Ch's Dantonette,
Ch's Demarest.
Hy. Peychaud.
M. A. Peyroux,
Joseph Pierre,
Louis Roger,
Wm. Remele,
Richards & Marsh,
Peter St. Amant,
Wm. Sommer,
B. Saloy,
Thos. Singleton,
Mathilda Théard,
Thos. Wiltz
Mrs. Ch's Walsh,
J. Jacquette,
Jean M. Journes,
Louis Jarreaum,
Heirs of Mrs. E. E. Jackson,
W. H. Johnson,

Joseph Robins.
Bernard Saux,
J. Sigrest,
E. H. Singleton.
Jos. Toregano.
B. O. Vignaud,
John Wiltz.
Madeline Wiltz,
Jean R. Grandam.
Widow James Gallagher.
August Gautier,
Joseph Guerero,
John Heaver,
Louis Hastentein,
O. E. Hall,
H. D. Hopkins,
Prosper Howard
Mathias Herde,
Henry F. Hall,
Leopold Hasslett,
J. W. Harrison,
W. Harrison,
Dr. J. A. Hinson,
Jules Haltier,
Wm. Hargroder,
Pierre Jourdain,
Gottsfried Jacobi,
Marius Mullier,
Jacque Marque
Jacques Muller and wife.
Mrs. Ch's Mathews.
Francis Nije,

Jean H. Klan,
Benj. Kidder,
J. B. Kidder.
Ch's Lewis,
J. B. Lee,
Ch's Lesseps,
Jean Lavie,
Joseph Lettrie,
Wid. R. Lecul,
Widow Alex. Lamy,
Joseph Lobat,
Eulalie Leffeteau,
J. P. Maglish,
Minor O. Meunier,
Joseph Madron,
Isaac Majendo,
Joseph Mouton,
David B. North,
Felix Pitcher,
Marcelin T. Pecora,
Victor Perilliat,
Wm. Robert,
Jacob Rodriguez,
A. Richards,
Jean Bazac
C. C. Sampson,
Louis Surgi,
J. Serementero,
A. L. Tissot,
Jaachim Viasco,
Z. Wentrel,
Anna Williams.

(Printed Record, vol. vi, p. 5643.)

Pro Confesso against the City of New Orleans and Others.

Extract from Chancery Order Book, Monday, January 15th, 1872.

MYRA CLARK GAINES
vs.
P. F. AGNELLY *et als.* } No. 6085.

On motion of J. Q. A. Fellows, solicitor for complainant, and on showing that the following named defendants have failed to make answer to the bill of complaint within the extended time allowed them at their request and by order of court, or to ask for or obtain any further extension of time within which to answer or make further plea, to-wit: City of New Orleans, Executors of Josiah Cole, William Chambers, P. Brunet, Thomas Robertson, E. A. Minturn, *alias* Dauphin; Jos. Keating, M. Meilleur, Geo. B. Ebberling, M. Elliott, Mrs. J. V. Gottschalk, Jean Ollie, Rudolph Rousseau, V. de St. Romes, J. B. Slawson, P. S. Wiltz, Wid. J. C. St Romes, and Dusan de la Croix, it is ordered that the allegations of said bill of complaint be and they are hereby taken *pro confesso* as to each of the above named defendants.

(Printed Record, vol. vi, p. 5668.)

Decree on Pro Confesso. Entered and Filed March 28th, 1872. X, No. 8825, offered by Complainant, August 18th, 1880.

United States Circuit Court. In Chancery.

MYRA CLARK GAINES
vs.
P. F. AGNELLY *et als.* } No. 6085.

This cause came on to be further heard at this term on the motion of counsel for the complainant to make absolute the decree *pro confesso* entered at the June rules of 1871, and filed on the 5th June, 1871, then taken against Pierre Bordes, Jean Bazean, Widow R. Bringier, J. Bures, Robt. C. Cleburne, Aristide Carlon, Lucien Franciere, Auguste Fouchet, Juan Frederick, J. C. Gabaroche, Widow James Gallagher, Prosper

Howard, Louis Jarreau, Joseph Lettorie, Jos. Labat, Jacques Mullier, Joseph Prosper, Victor Perilliat, Jacob Rodrigues, A. Richard, Louis Harstenstein, Minor A. Mennier, J. M. Crawford, Eulalie Leffeteau, Marie Mennier, and D. Powy, and considering the articulations in said bill of complaint and the matters therein contained and set up, and the said decree of *pro confesso*, it is now hereby ordered, adjudged, and decreed that as against the said defendants, and so far as the property described in said bill of complaint is concerned, to-wit:

1st. A tract of land on the Gentilly road, in the City of New Orleans, parish of Orleans, and State of Louisiana, lying between the Gentilly road, the Canal Marigny, and Treasure street, and on both sides of Spain street, being about 22 arpents front on Gentilly road, as by plan of Allan Demicourt, 6824 dated April 21, 1856, being *being* the same land purchased by Daniel Clark from J. B. Dejean by acts passed before M. D'Armas, notary public, on the 3d and 11th July, 1812, and 24th February, 1813, and from R. Clark Smith, by act before John Lynd, notary public, in 1813, as per said notary's records of that year, page 69.

2d. A tract of land containing about one hundred and thirty-five acres, more or less, situated in the quarter Bayou St. John, bounded by the Canal Carondelet, Dorgenois, and Bellechasse streets, by land that in 1812 was owned by Mrs. Henry and Evariste Blanc, and by the Bayou St. John, according to a plan of said land drawn by Jos. Pilié, dated August 20, 1821, annexed to an act of sale of said tract made by Richard Relf and Beverly Chew, as executors of Daniel Clark, to Evariste Blanc, and passed before P. Pedesclaux, notary public, October 30th, 1821, now of record in said Pedesclaux notarial records, said land having been acquired by the said Daniel Clark in his lifetime from Nicholas Vidol by act before C. Ximenes or Pedesclaux, notary public, about July 24th, 1804.

3d. A tract of land lying and being in the City of New Orleans, bounded by Dorgenois and Bellechasse or part of St.

John street, the Bayou St. John, St. John route, and Gentilly road, and particularly described upon a plan of said land made by Lafon, and deposited in the office of P. Pedesclaux, notary public, June 9, 1809, which land was acquired by said Daniel Clark from Nicholas Marie Vidal by act in the office of L. T. Caire, notary public, July 24, 1804, and from Louis Antoine Blanc, by act before W. Christy, January 25th, 1805, and others in July 15, 1805, August 22, 1809, and July 23, 1807, the said bill be taken and held for confessed and true; and that the said Myra Clark Gaines, complainant in this cause, is the only legitimate child of Daniel Clark in the said bill and proceedings mentioned, and as such was exclusively invested with the character of such legitimate child, and entitled to all the
6825 rights of the same, and that under and by virtue of the last will and testament of the said Daniel Clark, the said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and as such entitled to all the estate, whether real or personal, of which he, the said Daniel Clark, died possessed, subject only to the payment of certain legacies therein named; and especially is she entitled to all the rights of the said Daniel Clark at the time of his death, and in her said capacities to the property hereinbefore described, and any and all such portions thereof as the said defendants hereinbefore named or either or all of them may have been in possession of at the time of the filing of this bill of complaint, to-wit: the 12th February, 1870, or at any time since; and it is further decreed that this matter be referred to John B. Weller, Esq., a master in chancery of this court, to determine the boundaries of the portions of the said property, held as aforesaid by the said defendants, with the rents and revenues thereof, he giving notice to said parties of the time and place at which he will proceed to said examination; and it is further decreed that the complainant have execution against the said defendants for all such costs as she may have incurred in this behalf in this cause.

(Signed) W. B. WOODS, *Judge*.

(Printed Record, vol. vi, p. 5859.)

Order. Pro Confesso Made Absolute as to Property of M. A Peyroux.

Extract from the Minutes, Wednesday, May 20th, 1874.

MYRA CLARK GAINES *vs.* P. F. AGNELLY *et als.* } No. 6085.

7111 On motion of J. Q. A. Fellows, solicitor for the complainant, and on suggesting that the assessment rolls of the City of New Orleans for 1870 show that the following described property, portions of that claimed in this suit, stand assessed as the property of parties cited as defendant herein, and who made appearance through their solicitors, Messrs. Taylor and McConnell, but the order was made permitting a judgment *pro confesso* to be set aside for the purpose of answering, yet no answer has been made or claim set up thereto ; it is now ordered that said judgment *pro confesso* be made absolute and the property declared to be the property of this complainant, and she be allowed, if necessary, a writ of possession therefor, to-wit :

1. All that square of ground, No. 407, bounded by Gayoso, Dumaine, Salcedo and Bellechasse streets, except lots 8 and 9 at the corner of Gayoso and Dumaine streets, said two lots measuring 58 feet 6 inches four lines front on Dumaine street by 100 feet in depth and front on Gayoso street, assessed in the name of M. A. Peyroux.

Decree. Reports as to Metes and Bounds made Absolute.

Extract from the Minutes, Wednesday, May 24th, 1874.

MYRA CLARK GAINES *vs.* P. F. AGNELLY *et als.* } No. 6085.

On motion of *of* J. Q. A. Fellows, solicitor of complainant, it is ordered that the reports of J. B. Weller, Esq., master in chancery, under order herein of 28th March, 1872, made by him

on May 17th, 20th and 24th, 1872, reporting the metes and bounds of such portion of land embraced in said order (making absolute the judgment *pro confesso* of June 5th, 1871), as were held on the 22d November, 1865, or at any subsequent time, by the parties—be now confirmed, and the said complain-
7112 ant, Myra Clark Gaines, be put in possession of the same, and that, if necessary, writs of possession issue in her favor therefor, to-wit:

Lot No. 32, in square No. 59, bounded by Broad, Toulouse, White and St. Peter streets, measuring 30 feet front on Toulouse street by 100 feet in depth, on the rolls of the City of New Orleans for 1870 assessed as the property of Jean Frederick.

Lot No. 33, in the same square and of the same dimensions, and on said rolls assessed in 1870 as the property of Albert Richard.

Lot No. 34, in the same square and of the same dimensions, and on said rolls of the City of New Orleans assessed in 1870 as the property of Wid. James Gallagher.

Lot No. 35, in the same square and of the same dimensions, and on said rolls of the City of New Orleans assessed in 1870 as the property of Auguste Foucher.

Lot No. 36, in the same square and of the same dimensions, and on said rolls of the City of New Orleans assessed in 1870 as the property of Joseph Prosper.

Lot No. 37, in the same square and of the same dimensions, forming the corner of Toulouse and White streets, and on said rolls of the City of New Orleans assessed in 1870 as the property of Aristide Carlon.

Lot No. 3, in the same square, measuring 25 feet front on White street by a depth of 182 feet and at a distance of 100 feet from the corner of St. Peter street, on the rolls of the City of New Orleans for 1870 assessed as the property of Lucien Fouciere.

Three lots, numbered 6, 7 and 8, in the same square, measuring together 90 feet front on St. Peter street by 100 feet in depth at a distance of 60 feet from the corner of White street

on the rolls of the City of New Orleans for 1870 assessed as the property of Prosper Howard.

Three lots of ground, Nos. 31, 32 and 33, in square No. 340, bounded by Dorgenois, Broad, St. Anne and Dumaine streets, measuring together ninety feet front on St. Anne street by 100 feet in depth, at a distance of about 90 feet from the corner of Dorgenois street, and on the rolls of the City of New Orleans for 1870 assessed as the property of Widow R. Brugier.

7113 Lots Nos. 16 and 17, in the same square, measuring 62 feet front on Dumaine street by 162 feet in depth, at a distance of about 180 feet from the corner of Dorgenois street, and assessed on the rolls of the City of New Orleans for 1870 as the property of J. C. Gabaroche.

Lots 1 and 2 in square No. 338, bounded by Dorgenois, St. Peter, Broad and Orleans streets, measuring together 63 feet front on Orleans and St. Peter; lot one forming the whole front Broad street by 114 feet, assessed on the rolls of the City of New Orleans for 1870 as the property of James Burs.

Lot No. 19, in square No. 427, bounded by Rendon, Toulouse and Lopez streets, and Carondelet Walk, having 31 feet front on Carondelet Walk by 100 feet in depth, at a distance of about 93 feet from the corner of Lopez street, assessed on the rolls of the City of New Orleans for 1870 as the property of Victor Perrilliat.

A lot in square No. 373, bounded by St. Anne, Dupré, Dumaine and White streets, measuring 32 feet front on Dupré street by a depth of 141 feet, at a distance of 100 feet from the corner of St. Anne street, assessed on the rolls of the City of New Orleans for 1870 as the property of Louis Jarreau (Jessum).

A lot of ground in square No. 392, bounded by Dupré, Toulouse, Gayoso and St. Peter streets, having 31 feet front on St. Peter street by 100 feet depth and front on Dupré street, forming the corner of these streets and assessed on the rolls of the City of New Orleans for 1870 as the property of Mrs. Jacques Muller. Two lots of ground in the same square, adjoining each other, and the lot last described, having 62 feet front on St.

Peter street by 100 feet in depth, assessed on the rolls of the City of New Orleans for 1870 as the property of Robert C. Cleburne.

A lot of ground in the same square adjoining the property last described, having 31 feet front on St. Peter street by
7114 100 feet in depth, assessed on the rolls of the City of New Orleans as the property of Jacob Roderigues (Rodnery).

Lot No. 14 in the square No. 336, bounded by Broad, Toulouse and Dorgenois streets and Carondelet walk, measuring 31 feet front on Carondelet walk, running through to Toulouse street, with a depth of 70 feet, and being at a distance of 31 feet from Dorgenois street, assessed on the rolls of the City of New Orleans for the year 1870 as the property of Joseph Labator (Jean Labartho).

A lot of ground in square No. 352, bounded by Ursuline, White, Oak and Seventh streets, measuring 33 feet front on Ursuline street by a depth of 162 feet, adjoining the property of David Stickney, assessed on the rolls of the City of New Orleans for 1870 as the property of Eulalie Lafiteau.

A lot of ground in square No. 1520, or original No. 7, bounded by Broad, Washington, Seventh and Lepage streets, being lot No. 9 on the original plan of the faubourg St. John, measuring 64 feet front on Lepage street by a depth of one hundred and ninety-one feet, assessed on the rolls of the City of New Orleans for 1870 as the property of Marie Meunier and D. Powy (J. Magne).

The whole of square of ground No. 1791, bounded by Abundance, Agriculture, St. Anthony, and Antoinne or Annette streets, assessed on the rolls of the City of New Orleans for 1870 as the property of Louis Hartstentein.

The whole of square of ground No. 1957, bounded by Paris avenue, Marigny, and Gentilly road, a triangle, assessed on the rolls of the City of New Orleans for 1870 as the property of Adolphe Meunier (a minor).

NOTE—Neither of these papers are signed.

(Printed Record, vol. vi, p. 5900.)

SAME
vs.
L. T. COMPTON *et als.* } 5058.

SAME
vs.
A. HANNAN *et als.* } 5099.

JOSEPH FUENTES *et als.*
vs.
MYRA C. GAINES. } 8038.

And now Mrs. Myra Clark Gaines, complainant in the above suits Nos. 2734, 3663, 4006, 6085, 4031, 4051, 5058, 5099, and defendant in suit No. 8038, through her solicitor, Wm. Reed Mills, moves the court that the costs in said above numbered and entitled causes be taxed. Whereupon it was ordered that the matter be referred to J. W. Gurley, commissioner, for taxation.

Motion and Order, Referring Certain Cases to Master to Compute the Rents and Revenues since the Property came into the Possession of the Defendants.

(Printed Record, vol. vi, p. 5007.)

Decree Confirming Pro Confesso of June 22d, 1877, XI, U. S. C. C., No. 8825, offered by Complainant.

Extract from the Minutes, November 13th, 1877.

MYRA CLARK GAINES
vs.
P. F. AGNELLY *et als.* } No. 6085.

On motion of Wm. Reed Mills, solicitor for complainant in the above entitled and numbered cause, and on representing to the court that heretofore, in the April term of this court, on the 22d June, 1877, judgments *pro confesso* were taken and entered against the following defendants in this said cause: John Bonneau, Joseph Bompart, E. G. Douvillier, Juan Gonzalles, John Grandam, Jean Labbe, J. A. Lannenville, Mrs. C. Carty,

Jean Marie Journé, Widow Alex. Lammy, Alice Lancheaux or Lacroix, Leotine Lancheaux or Lacroix, Seline Lancheaux or Lacroix, J. A. Laneville, *alias* Louvillier, John McGinness, Isaac Magerado, D. B. Macarty, Louis H. Moore, Joseph M. Moore, Joseph Beers, Mrs. C. Bangeau, M. E. Pecora, Mrs. E. Pigeon, Henry St. Paul and wife, Joseph Sauterot, Wm. R. Stewart, Widow J. Touglet, J. Trudeau, and that no appear

ance, demurrer, plea or answer have been filed by any of

7164 said defendants: It is now ordered, adjudged and decreed that the said judgments *pro confesso* be now, and the same are hereby confirmed. And it is further ordered that E. Sabourin, master in chancery, be authorized and ordered to report to this court the respective properties belonging to the complainant, in possession of said defendants, both as to the metes and bounds and as to the amount of the fruits and revenues and value for use due by said respective defendants to said Myra Clark Gaines, complainant.

NOTE.—There is here also no decree of *ouster* or ejectment, nor is it signed.

Decree Confirming Pro Confesso Taken November 5th, 1877.

Extracts from the Minutes, June 20th, 1878:

MYRA C. GAINES
vs.
P. F. AGNELLY *et als.* } No. 6085.

This cause came on to be further heard at this term on the motion of solicitor of complainant to make absolute the decrees *pro confesso* entered at the November term, 1877, and filed on 5th November, 1877, then taken against L. Francois, Widow Marie Acten, Joseph Brunneau, Marie H. Brousset, Mrs. T. E. Canty, Mrs. L. Colomb, L. A. Dubourg, Arthur Dejean, Eugene Dunaud, Mrs. E. O. Freret, J. Lefebre, G. Landry, F. Mercadel, Mrs. Drouant, Isaac Magendo, John Newman, Henry Peychaud, Mr. P. Rochefort, Henry Rhoder, Louis St. John, Louisa E. Saurez, Matilda Thebault, Estate of H. Tricon, Joseph Torre-

gano, Mrs. Jos. Hopkins, Jos. Labate, Aristide Carlon, Victor Demourelle, and considering the articulations in said bill of complaint, and the matters therein contained and set up, and the said decrees of *pro confesso*, it is now ordered, adjudged and decreed that as against said defendants, and so far as the property described in said bill of complaint is concerned, to-wit:

1st. A certain tract of land, containing about one hundred and thirty-five acres, more or less, situated on the quarter of Bayou St. John, in the City of New Orleans, with all the buildings and improvements thereon, bounded by Canal, Carondelet, Dorgenois and Bellechasse streets, by land that in 1821 was owned by Messrs. Henry and Evariste Blanc, and by
7324 the Bayou St. John, according to a plan of said lands drawn by Jos. Pillié, dated August 20, 1821, annexed to an act of sale made by Richard Blanc, and passed before Phillipe Pedesclaux October 20, 1821, now of record in said Pedesclaux's notarial records; said land having been acquired by Daniel Clark in his life time from Nicholas Maria Vidal, by an act before C. Ximanas or P. Pedesclaux, notary public, on or about July 24, 1804.

2d. A tract or parcel of ground on the Gentilly Road in the City of New Orleans, lying between the Gentilly road, the Canal Marigny, Treasure and both sides of Spain street, having about twenty-two arpents front on Gentilly road, as by plan of Allen D. D'Hemicourt, dated April 21st, 1856, at the filing of this bill in the office of H. D. Stove, 18 Royal street, New Orleans.

3d. A tract of land lying and being in the City of New Orleans, bounded by Dorgenois and Bellechasse, a part of St. John street, the Bayou St. John route, and Gentilly road, and particularly described upon a plan of said land made by Lafon, and deposited in the office of P. Pedesclaux, notary public, June 9, 1809, which land was acquired by the said Daniel Clark from Nicholas Maria Vidal by an act in the office of L. T. Caire, notary public, June 24th, 1804, and from Louis Antoine Blanc, by act passed before Wm. Christy, January 25, 1805, and others

on July 15, 1807, August 22, 1809, and July 23, 1807, the said bill to be taken and held confessed and true, and that the said Myra Clark Gaines, complainant in this cause, is the only legitimate child of Daniel Clark in the said bill and proceedings mentioned, and as such was exclusively invested with the character of such legitimate child and entitled to all the rights of the same, and that under and by virtue of the last will and testament of the said Daniel Clark the said Myra Clark
7325 Gaines is the universal legatee of said Daniel Clark, and as such entitled to all the estate, whether real or personal, of which the said Daniel Clark died possessed of, subject only to the payment of certain legacies therein named, and especially is she entitled to all the rights of the said Daniel Clark at the time of his death, and in her said capacities, to the property hereinbefore described, and any and all such portions thereof as the defendants hereinbefore named, or either or all of them, may have been in the possession of at the time of the filing of this bill of complaint, to-wit: the 22d March, 1865, or at any time since, and it is further decreed that this matter be referred to Ernest Sabourin, Esq., master in chancery of this court, to determine the boundaries of the portions of the said property, held as aforesaid by the said defendants, with the rents and revenues and value for use thereof.

It is further ordered that as to the rights of complainant for rent, revenues and value for use, she is entitled to all the income, revenues, profits and value for use and occupation which the evidence before the master shall establish, she, as owner, would have received or derived, whether the possessors had realized them or not, and whether the failure on said possessors' part to realize them resulted from not managing the estate with ordinary prudence, or from the estate remaining unproductive by reason of the title thereto being in dispute on account of a claim of title on the part of possessors now adjudged to have been unfounded. The proof must establish that if the complainant had been left undisturbed in the possession of this

property, which she has now recovered, by ordinary good management she would have caused the property to produce incomes which are to be adjudged to her. The master is to give notice to the said parties of the time and place at which he will proceed to the said examination, and it is further decreed
7326 that the complainant have execution against the said defendants for all such costs as she may have incurred in their behalf in this cause.

NOTE.—This paper not signed, only a draft of decree apparently.

The decree in Gaines vs. Agnelly is printed on page 5870, vol. vi; and includes but eleven special ejectment decrees relating to lands on Blanc tract, as we believe.

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